Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES

Government of Guam and Edna T. Paulino,
Petitioners,

v.

Pacificare Health Insurance Company
Of Micronesia Inc.,
dba Pacificare Asia Pacific,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the Territory of Guam

Petition for Writ of Certiorari

Charles H. Troutman, Deputy Attorney General
Office of Attorney General, Government of Guam
Suite 2-200E, 120 West O'Brien Drive,
Hagåtña, Guam 96910
Tel: (671) 475-3324
Counsel for Petitioners

QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. *et seq.*, made applicable to all arbitrations in the territory of Guam by 9 U.S.C. 1, prohibits arbitrators from terminating a contract for grounds not specified in the contract.

LIST OF PARTIES AND AFFILIATES

The Petitioner is the Government of the unincorporated territory of Guam established by 48 U.S.C. 1421a.

The Respondent is Pacificare Health Insurance Company of Micronesia, Inc. dba Pacificare Asia Pacific.

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Petitioner Government of Guam respectfully requests that this Court grant its Petition for a Writ of Certiorari to review the Opinion of the Supreme Court of Guam.

OPINIONS BELOW

The Opinion of the Supreme Court of Guam is *Government of Guam v. Pacificare Health Insurance Co., of Micronesia, Inc.*, 2004 Guam 17. (hereinafter "Opinion") It is available at 2004 WL 2492881. It also appears in the appendix of the Petitioner (Pet. App.) at Pet. App. 1a-56a. The Order denying rehearing is unpublished and appears at Pet. App. 1b-3b. The Superior Court of Guam's Decision and Order vacating the arbitral award and denying confirmation of that award is unpublished and appears at Pet. App. 1c-36c. The award of arbitration appears at Pet. App. 1d-2d.

JURISDICTION

The judgment sought to be reviewed was entered on September 20, 2004. Pet. App. 1e-3e. A timely Motion for Rehearing was filed and denied by the Supreme Court of Guam on November 11, 2004. Pet. App. 1b-3b. This Court has jurisdiction to grant this Petition pursuant to 28 U.S.C. §1257(a) as applied to the territory of Guam by 48 U.S.C. §1424-2 as amended by Section 2 of P.L. 108-378, effective on October 30, 2004.

RELEVANT STATUTORY PROVISIONS

9 U.S.C. §1

> "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage,

supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined means commerce among the several states or with foreign nations, or in any territory of the United States or in the District of Columbia, or between any such Territory and another, or between the District of Columbia and any State or Territory of a foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. §2

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. §10

(a) In any of the following cases the United States court in and for the district

wherein the award was made may make an order vacating the award upon the application of any party to the arbitration-

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Title 4 Guam Code Annotated §4301(g) – Group Insurance – Continuing Clause

(g) I Maga'lahen Guahan [the Governor] of Guam shall incorporate the continuing provision clause made available to Guam Memorial Health Plan, FHP, Inc. and Staywell, which was the subject of the District Court of Guam Appellate Division Case *Government of Guam v. FHP, Inc.*, 1991 WL 275584 [only cite available] (D. Guam App.Div. 1991), in the government's group health insurance agreement with any health insurance company, or its assignees or successors, which has contracted with the government of Guam for at least two (2)

consecutive years. This Subsection shall be retroactive to include any insurance companies falling within said classification for the past five (5) years from the date of enactment of this Subsection, regardless of whether they currently have a group health insurance contract with the government of Guam, and shall entitle the group health insurance company to immediately enter into a contract with the government with said continuing provision included. In the event that the government had already negotiated the terms of a contract with a group health insurance company qualifying herein, but not executed the contract, said contract shall be offered to the insurance company with the continuing provision incorporated.

For purposes of starting the new contracts with the insurance companies qualifying for the continuing clause, the government of Guam shall immediately conduct a government-wide thirty (30) day Open Enrollment for all group health insurance companies qualifying as of the date of enactment of this Act.

STATEMENT OF THE CASE

On November 18, 2002, the Government of Guam (hereinafter, "the Government") entered into a contract between it and Pacificare Health Insurance Company of Micronesia, Inc. dba Pacificare Asia Pacific (hereinafter "Pacificare") to provide health care benefits for its employees. As in past years and now required by statute (4 GCA §44301(g)), the contract for Fiscal Year 2004, the year

in question here, contained the following language - referred to in 4 G.C.A. §4301(g) as the "continuing provision" and colloquially known as the "continuing clause":

> Term. This contract, in its original form, became effective August 1, 1973. It shall renew automatically for one year each October 1st unless terminated for major default in availability or quality of services, given by written notice from the Government of Guam to Pacificare not less than ninety (90) calendar days from the renewal date, or unless modified by mutual agreement.

Opinion ¶42, Pet. App. 32a.

During the negotiations for the FY 2004 employee health benefit package, the parties could not agree on rates. The matter went to arbitration and an award was made. Pet. App. 1d-2d. The award declared, as desired by Pacificare and opposed by the government of Guam, that the contract was to be terminated at the end of the current fiscal year.

The Government sought to overturn this award and it prevailed in the Superior Court of Guam. *Government of Guam and Edna T. Paulino v. Pacificare Health Insurance Company of Micronesia, Inc. dba Pacificare Asia Pacific,* Civil Case No. CV1426-03, (Sup.Ct. Guam, October 20, 2003). Pet. App. 1c-36c. The Superior Court characterized the Government's argument that the arbitrators exceeded their powers by allowing Pacificare to terminate the contract upon grounds not specified in the contract as an argument relating to the *arbitrability* of the termination issue. Pet. App. 17c. The Superior Court held that the arbitrators exceeded their powers by allowing Pacificare to terminate

the contract on the grounds that agreement on medical rates had not been reached. Pet. App. 33c-36c.

Pacificare appealed to the Supreme Court of Guam, which rejected the Petitioner's (Government's) challenge to the arbitration award based upon the Federal Arbitration Act. *Government of Guam and Edna T. Paulino v. Pacificare Health Insurance Company of Micronesia, Inc. dba Pacificare Asia Pacific,* 2004 Guam 17. Pet. App. 1a-56a.

In its Opinion, at ¶11-12, the Supreme Court of Guam held that the Federal Arbitration Act, 9 U.S.C. §§1-16 (hereinafter "FAA") applied to the facts of the case. Pet. App. 7a-8a. At ¶24 of the Opinion, the Court noted that under 9 U.S.C. §10(a)(4) a lower court could vacate an arbitration award when the arbitrators exceeded their powers, and further noted that arbitrators would exceed their powers if they arbitrated a dispute that was not arbitrable in the first place. Pet. App. 19a-20a. At ¶34 of the Opinion, the Court held that in light of the broad language of the arbitration clause, "a dispute concerning whether Pacificare could be released from its obligations was a subject matter which was arbitrable under the parties' Agreement." The Supreme Court also held "[f]urthermore, there is nothing in the Agreement which excluded the issue of termination from resolution pursuant to the arbitration clause." Pet. App. 26a. At ¶26 of the Opinion, the Court found that the fact that the contract enumerated specific circumstances where termination was allowed did not alter its conclusion that the issue of termination was within the arbitrators' authority to decide. Pet. App. 20a-22a. However, the majority finally concluded that the Superior Court had erred in even ruling on this question, since the case turned on a procedural matter, which was within the purview of the arbitrators, and was not the court's, to decide. Opinion, at 34. Pet. App. 26a.

The dissenting opinion began by noting the arbitrators are only permitted to decide procedural matters that are related to subjects which are arbitrable in the first place, and that the question of whether Pacificare had a continuing obligation to provide coverage when the parties failed to mutually agree on rates for FY 2004 was one for the courts to decide since it related to the arbitrability of the termination issue. Opinion at ¶60. Pet. App. 44a. The dissenting judge went on to side with the Superior Court's holding that termination of the arbitration award for failure of the parties to agree on rates was in excess of the powers of the arbitrators and presented cause to vacate the arbitration award under 9 U.S.C. §10(a)(4). The dissenting judge said that "it is clear that the Government . . . did not intend to arbitrate the question of Pacificare's continued obligation to offer coverage where the parties could not simply agree on rates. Thus, the arbitrators ignored the Agreement's clear contractual limitations regarding their authority. The arbitrators acted on a subject which they had no authority to decide." Opinion, at ¶73. Pet. App. 55a-56a. The Guam Supreme Court, however, after further analysis, upheld the arbitrators decision permitting the contract to be terminated because the parties could not agree on rates.

From that Decision, the Government is petitioning for a Writ of Certiorari from this Court.

STATUTORY BACKGROUND

Section 2 of the Federal Arbitration Act (hereinafter, "the FAA") provides that arbitration agreements subject to the FAA "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. As this Court has explained, Congress's goal in enacting the FAA was to

overcome deep-sated judicial hostility to arbitration and thereby allow private parties to choose to resolve their disputes through arbitration rather than litigation. See, e.g., *Volt Info. Scis, Inc. v. Board of Trs. Of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985). Specifically, the FAA permits private parties to "'trade[ ] the procedures . . . of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). Moreover, because judicial hostility to arbitration had existed in both federal and state courts, this Court concluded 20 years ago, and more recently has reaffirmed, that §2 of the FAA applies both in state and federal courts. *Southland Corp. v. Keating*, 465 U.S. 1, 12-15 (1984); see *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995) (reaffirming *Southland*).

Essential to Congress' goal of ensuring the enforcement of parties' agreements to arbitrate is the principle that such agreements may not be rewritten by courts. Rather, state and federal courts must "'rigorously enforce' such agreements according to their terms." *Volt*, 489 U.S. at 479 (quoting *Dean Witter*, 470 U.S. at 221). Indeed, this Court repeatedly has explained that "the central purpose of the Federal Arbitration Act [is] to ensure 'that private agreements to arbitrate are enforced according to their terms.'" *Mastrobuono v. Shearson Lehman Button, Inc.*, 514 U.S. 52, 53-54 (1995) (quoting *Volt*, 489 U.S. at 479). See also *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (enforcement of agreement according to terms is "the very purpose of the Act"); *Volt*, 489 U.S. at 476 ("[T]he federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."); see also *E.E.O.C. v. Waffle House, Inc.*, 122

S.Ct. 754, 764 (2002) ("Arbitration under the [FAA] is a matter of consent, not coercion.") (alteration in original) quoting *Volt*, 489 U.S. at 479.

FACTUAL BACKGROUND

In November of 2002, Pacificare and the Government executed a 2003 Group Health Insurance Agreement/Health Services Agreement (hereinafter "the Agreement"). The Agreement was a contract for group health insurance for Government of Guam employees, retirees and dependents for Fiscal Year 2003. The Agreement contained an automatic annual renewal provision colloquially known as the "continuing clause", *supra*, and general procedures for setting rates annually. Opinion, §2 Pet. App. 3a. The Agreement also contained an "Attachment III – Pacificare Asia Pacific Arbitration Procedure." This agreement to arbitrate contained a broad arbitration clause, set forth in relevant part as follows:

> Section 1. ARBITRATION PROCEDURE
>
> "Arbitration"
>
> 1.01. *Any dispute* or controversy between the parties arising under this *Agreement* shall be submitted to binding arbitration.

Opinion ¶34, Pet. App. 26a.

The Agreement also set forth specific grounds for termination of the Agreement, to wit:

1. The automatic renewal clause, section 2.1 of the Agreement, provided that the Agreement "shall renew

[14] We review a lower court's order vacating an arbitration award *de novo*. *Teamsters Local Union 58 v. Boc Gases*, 249 F.3d 1089, 1093 (9th Cir. 2001); *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 672 (5th Cir. 2002). The *de novo* "standard is 'intended to reinforce the strong deference due an arbitrative tribunal.'" *Brook*, 294 F.3d at 672 (quoting *McIlroy v. PaineWebber, Inc.*, 989 F.2d 817, 820 (5th Cir.1993)). The lower court's legal rulings in vacating an arbitration award are reviewed *de novo*, while factual findings are reviewed for clear error. *See* Sumitomo Constr. Co. v. Zhong Ye, Inc., 1997 Guam 8, ¶ 9.

Government of Guam employees prior to the resolution of the dispute by the arbitrators. The Government essentially sought performance of the Agreement *pending arbitration*. We are guided by the reasoning articulated by the Fourth Circuit in *United States v. Bankers Ins. Co.*, 245 F.3d 315, 320 (4th Cir. 2001). The Court stated:

> Put simply, the doctrine of sovereign immunity is not in any way implicated or threatened by the Government's compliance with its contract obligations. When the Government chooses to seek damages in a civil action, it—like all parties—should abide by the law, including an arbitration process to which it is contractually bound.

Id. Here, the Government itself argued before the lower court that the parties should await the outcome of the arbitration. Considering this, it would be "grossly inequitable" for the Government to use sovereign immunity as a sword to negate the arbitration agreement itself. *Ruppenthal v. State, By and Through Econ. Dev. & Stabilization Bd.*, 849 P.2d 1316, 1321 (Wyo. 1993) ("To permit [a recoupment defense] would seem to be no more than simple justice; to deny it the right would be grossly inequitable. No one would assert that in an action by the sovereign, valid legal defenses should be denied the defendant.") (alteration in original). "To allow a state to enter into a contract and then deny the other contracting party a remedy under the contract would be to 'ascribe bad faith and shoddy dealing to the sovereign.'" *State v. Sorensen*, 436 N.W.2d 358, 364 (Iowa 1989).

nature, that the issue of what kind of arbitration proceeding the parties agreed to was a question courts presume the parties want the arbitrators, and not the courts, to decide. The plurality remanded the case to the arbitrators for decision on whether the contracts permitted or forbade class actions.

Because the plurality in *Green Tree Financial Corp.* did not reach the issue of whether the FAA allows arbitrators to find that, under a broad arbitration clause in a contract, contractual rights or obligations exist in the absence of express provision of those rights or obligations elsewhere in the contract, the question remains undecided by this Court. Another reason this Court should grant certiorari was the Guam Supreme Court's rationale for upholding the arbitrators' decision that the Agreement could be terminated for grounds not specified in the Agreement. The stated reasons were that such a termination was encompassed within the ambit of a broad arbitration clause in the Agreement, such a termination was not prohibited by the Agreement, and such a termination was justified because of the impossibility of foreseeing all possible grounds for termination. As will appear, the rationale of the Opinion contravened relevant decisions of the Court holding that an arbitration agreement should be strictly enforced according to its terms.

Therefore grounds exist for this Court to grant review. Rule 10(c), Rules of the Supreme Court of the United States.

> The Federal Arbitration Act Applies To All Arbitration Within Guam And Guam Courts Are Required To Follow The Federal Case Precedent In Applying The Act

The Federal Arbitration Act applies to arbitration agreements in contracts involving "commerce in the Territories," 9 U.S.C. §1 West, Westlaw through P.L. 108-498 (End) (excluding P.L. 108-446, 108-447.) ("['C]ommerce,' as herein defined means commerce among the several states . . . or in any territory of the United States . . . or between any such Territory and another, or between any such Territory and any State or foreign nation . . .")

In its Opinion, the Guam Supreme Court held that the FAA applied to the dispute in the instant case. Opinion ¶11-12. Pet. App. 7a-9a. In a footnote, the Court indicated that since the local statute addressing vacation of arbitration awards was identical in language to 9 U.S.C. §10, that the Superior Court's Decision and Order made pursuant to that local statute would be reviewed as "having been made pursuant to" 9 U.S.C. §10. Opinion, ¶17, note 5. Pet. App. 14a-18a. Hence the Supreme Court would "rely on authority interpreting and applying section 10 of the FAA in reviewing whether the lower court correctly vacated the arbitrators' award." *Id.*.

The Ninth Circuit Court of Appeals, in *Guam v. Guerrero*, 290 F.3d 1210, 1217-1218 (9th Cir. 2002) held that a territorial court lacks the authority to interpret a federal statute contrary to the interpretation this court has given it, *citing Kepner v. United States*, 195 U.S. 100, 123-24 (1904); *Weems v. United States*, 217 U.S. 349, 367 (1910); *United States v. Husband R..*, 453 F.2d 1054, 1058 (5th Cir. 1971); and *South Porto Rico Sugar Co. v. Buscaglia*, 154 F.2d 96, 100 (1st Cir. 1946). In the instant case below, the Supreme Court of Guam, while citing federal law as controlling, deviated from federal precedents in concluding that the arbitral award against the Government of Guam was proper.

The FAA Requires That An Arbitration Agreement Be Strictly Enforced According To Its Terms

Parties are required to arbitrate only those questions that the parties have agreed in advance to submit to arbitration. *Mitsubishi Motors Corp.*, 473 U.S. at 626. Resolution of whether the parties in the instant case agreed that the arbitrators could terminate the Agreement on grounds other than those specifically provided in the Agreement implicates two seemingly contradictory policies promoted by the Federal Arbitration Act – the policy favoring arbitrability and the policy requiring strict enforcement of the parties' arbitration agreements.

Determining whether parties have agreed to arbitrate a dispute involves application of the federal substantive law of arbitrability. *Id.* at 626, quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983). That body of law counsels that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration ... . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration". *Id.*

However, arbitration awards must be consistent with the central purpose of the Federal Arbitration Act, which is to ensure that "private agreements to arbitrate are enforced according to their terms". *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. at 479. See also cases cited *supra*, at 8 and cases cited *infra* at 17. *The Government contends that where, as in the instant case, the arbitration agreement does not expressly provide for, or forbid, arbitration of the matter in controversy, the policy requiring enforcement of arbitration agreements according to their*

terms should apply. Hence the Guam courts had no authority to authorize arbitrators to allow termination of the contract for failure of the parties to agree on rates, where the Agreement did not expressly provide for termination based on that ground.

The Guam Supreme Court, in finding that the question of whether the Agreement could be terminated for failure of the parties to agree on rates was arbitrable, based its decision on the policy favoring arbitrability, stating that any doubts about the scope of the arbitrable issues should be decided in favor of arbitration. Opinion ¶26, Pet. App. 20a-22a. The majority, writing the Court's Opinion, stated that before concluding that the parties intended that an issue not be arbitrated, the intent to exclude such issues from arbitration must be clear, and that ambiguities as to the scope of the arbitration clause must be resolved in favor of arbitration. Opinion ¶26, Pet. App. 20a-22a. The Guam Supreme Court concluded that Pacificare's continued obligation to provide health coverage for FY 2004 in the event of the parties' failure to agree on rates was included within the ambit of the Agreement's broad arbitration clause. The Court reached this conclusion in part because of the breadth of the language of the arbitration clause and the lack of any provision in the Agreement which would prohibit termination based on failure to agree on rates. Opinion ¶34, Pet. App. 26a.

The Court also concluded that termination was allowable for a ground not specified in the Agreement because the parties could not be expected to anticipate every possible issue that could arise, and provide for it in the Agreement. Opinion ¶43. Pet. App. 32a-34a.

The dissenting Justice, in his explanation of the reasons he believed that the issue of termination upon the

parties failure to agree on rates was not arbitrable, did not mention the policy that an arbitration agreement be strictly enforced according to its terms. However, he did quote from some case holdings to the effect that, in determining whether an issue was arbitrable, the parties' intent was paramount. He finally concluded with the opinion that, when determining whether the parties intended that a particular subject should be arbitrated, the standard of proof should be "clear and unmistakable", the same standard used in determining *who* should determine questions of arbitrability. Opinion ¶72, Pet. App. 53a-54a.

Thus the Government contends that both the majority and the dissent in the Opinion below were incorrect in their approach to the question of the arbitrability of Pacificare's continued obligation to provide coverage in FY 2004, and that the proper resolution of the question is found in the policy requiring strict enforcement of the terms of a contract. Although this argument was not made below, the issue to which it relates – arbitrability – was raised below. *Illinois v. Gates*, 462 U.S. 213, 220 (1983) ("Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed.")

The FAA's policy of strict enforcement of the terms of an arbitration agreement would allow termination for only the grounds specified in the Agreement, and, as will appear *infra*, pre-empts the Guam Supreme Court's construction of the Agreement.

A number of cases of this Court have held that interests of efficiency and equity do not supercede the interest in strictly enforcing an arbitration agreement in accordance with its terms when the issue sought to be arbitrated is not addressed in the contract.

In *Moses H. Cone Memorial Hospital*, 460 U.S. at 20 and *Dean Witter Reynolds, Inc.*, 470 U.S. at 219-22, this Court insisted on compliance with the terms of the arbitration agreement even though the result would be bifurcated and piecemeal proceedings, stating in *Volt Information Sciences, Inc.*, 489 U.S. at 478, that the FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms."

In the case below, the majority justified its allowance of termination on a ground not specified in the Agreement for the reason that the parties could not be expected to anticipate every possible issue that may arise. As indicated, *supra*, this Court has held that deviations from compliance of the exact terms of an arbitration agreement are not justified by considerations of equity and efficiency.

There are good reasons for limiting arbitrable issues to the terms of a contract. To do otherwise allows a court to frustrate private agreements by modifying those agreements whenever they do not unambiguously preclude a result that the court, in its discretion, believes will serve efficiency or equity. Moreover, the FAA was designed to allow parties to choose arbitration rather than litigation by mandating that courts enforce such agreements in accordance with their terms; to hold otherwise would obligate parties to draft arbitration agreements foreclosing every eventuality. Moreover, allowing courts to substitute their notion of equity and efficiency for that of the parties would deprive parties of the benefit of their bargain. Finally, arbitration agreements often appear in form contracts that are employed or appear in more than one state. Therefore a uniform national rule is essential to ensure that similar cases are resolved in the same way regardless of where the parties reside.

For the foregoing reasons, the policy that agreements to arbitrate should be strictly enforced according to their terms should be applied to the facts of this case, and as a consequence, the Opinion of the Guam Supreme Court should be pre-empted by this federal policy.

The Guam Supreme Court Opinion Was Pre-empted By The Policy Of The FAA

"States may regulate contracts, including arbitration clauses, under general contract law principles," *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 281 (1995). "[T]he interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Volt Information Sciences, Inc.*, 489 U.S. at 474. But "state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law – that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.*, at 477, (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941)).

The "central purpose" of the FAA is "to ensure that private agreements to arbitrate are enforced according to their terms." *Mastrobuono*, 514 U.S. at 53-54 (quoting *Volt, 489* U.S. at 479 (internal quotation marks omitted)). See also *Doctor's Associates, Inc.*, 517 U.S. at 688; *First Options of Chi, Inc. v. Kaplan,* 514 U.S. 938, 947 (1995). In other words, Congress sought simply to "place such agreements upon the same footing as other contracts." *Volt,* 489 U.S. at 474 (quoting *Scherk v. Alterto-Culver Co.*, 417 U.S. 506, 511 (1974) (internal quotation marks omitted)). This aim "requires that we rigorously enforce agreements to arbitrate," *Mitsubishi Motors Corp.*, 473 U.S. at 676 (quoting *Dean Witter Reynolds, Inc.*, 470 U.S. at 221 (internal quotation marks omitted)), in order to "give effect to the contractual rights and expectations of the parties," *Volt,* 489 U.S. at 479.

See also *Mitsubishi Motors*, 473 U.S. at 626 ("[A]s with any other contract, the parties' intentions control").

Under the FAA, "parties are generally free to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479. Here, the parties saw fit to agree that the arbitration conducted pursuant to the arbitration clause would be in conformity with the terms of the Agreement.

Sec. 1.01 Pacificare Asia Pacific Arbitration Procedure, Attachment III of the Agreement, states in relevant part:

> [t]he arbitration shall be in conformity with and subject to the following rules and procedures:
>
> . . .
>
> 1.01.24 Rules Binding. *The arbitrators shall be bound by this Agreement.* . . . (emphasis added)

Hence, section 1.01 of Attachment III incorporates the terms of the Agreement at large into the arbitration agreement, including the grounds for termination specifically enumerated in the Agreement, thus dispelling any doubt that the terms of the Agreement are part of the arbitration agreement.

Inasmuch as the purpose of Congress is that the Agreement be strictly enforced in accordance with its terms, and termination for failure of the parties to agree on rates is not a term of the Agreement, the Opinion of the Supreme Court of Guam should be pre-empted by the FAA.

This Case Presents An Appropriate Vehicle For Resolving Whether The FAA Allows Arbitrators To Find, Under A Broad Arbitration Clause In A Contract, That Arbitrable Contractual Rights Or Obligations Exist, In The Absence Of Express Provision Of Those Rights Or Obligations In The Contract.

The policy requiring strict enforcement of the terms of a contract by arbitrators was recently sought to be vindicated in this Court in a case where the contract was silent as to the matters in controversy. *Green Tree Financial Corp., v. Bazzle,* 539 U.S. 444 (2003). However, this Court, by characterizing the question sought to be arbitrated as relating to "arbitration procedures", did not reach the issue. This Court characterized the issue as a matter of procedural arbitrability properly remanded to the arbitrators to decide, instead of questioning whether the parties had actually agreed to submit the question to arbitration in the first place. Therefore, this Court did not reach the issue of whether a determination of the substantive arbitrability of a matter under a broad arbitration clause requires strict enforcement of the terms of the contract where the contract is silent as to the matter in controversy.

In *Green Tree Financial Corp.*, this Court upheld a decision by the Supreme Court of South Carolina confirming decisions of an arbitrator to treat an arbitration as a class action, where the contract in question was "silent" i.e., it did not expressly provide for, or forbid, class action arbitration. The arbitrator had held a lender liable for damages to a class of consumers for failure to make disclosures required by the South Carolina Consumer Protection Code. The question brought before this Court by the lender was whether an arbitration brought by a single consumer could be expanded into a class action consistent with the Federal Arbitration

Act, where the contract in question did not by its terms permit class-action arbitration.

In the case below, *Bazzle v. Green Tree Financial Corp.*, 569 S.E.2d 349 (S.C. 2002) the South Carolina Supreme Court confronted choosing between a line of cases expressing a majority view that for a class-action arbitration to be permissible it must be authorized by the terms of the contract between the parties, and line of cases expressing a minority view. The minority view holds a class action arbitration is permissible even if the contract is silent on the subject; provided, class action arbitration is encompassed by the language of the contract's arbitration clause, it would serve equity and efficiency, and it is not specifically prohibited by the contract. The Supreme Court of South Carolina adopted the minority view.

This Court granted certiorari to determine whether it was consistent with the Federal Arbitration Act for the South Carolina Supreme Courts to hold that class arbitration is permissible in the absence of language in the contract permitting it. 539 U.S. at 447. But the plurality of Justices (Breyer, Scalia, Souter and Ginsberg) did not rule on the question of whether the decision of the South Carolina Supreme Court was consistent with the Federal Arbitration Act. Only Justice Stevens (concurring in judgment and dissenting in part) ruled that the South Carolina Supreme Court's decision was consistent with the Federal Arbitration Act. The dissenting Justices (Rehnquist, O'Connor and Kennedy) ruled that the decision of the South Carolina Supreme Court was inconsistent with the Federal Arbitration Act.

The reason that the plurality did not rule on whether the conduct of the arbitration as a class action was consistent with the Federal Arbitration Act was because the plurality

held that the question of *what kind of arbitration proceeding the parties agreed* to, i.e. whether the contracts in question forbid class arbitration, was a question for the arbitrators, and not the courts to decide. The plurality held that this question related to "arbitration procedures" and was not the type of question the courts presume the parties intend the courts and not the arbitrators to decide. 539 U.S. at 452-453.

Hence, the plurality did not rule on whether the South Carolina Supreme Court's ruling was inconsistent with the Federal Arbitration Act, but rather remanded to the arbitrators the question of what kind of arbitration agreement the parties agreed to, i.e. whether the contracts in question forbid class arbitrations.

The dissenting Justices held that the question of what kind of arbitration proceeding the parties agreed to was "more akin to the agreement as to what shall be arbitrated, a question for the courts under *First Options [of Chi., Inc. v. Kaplan,* 514 U.S. 938 (1995)] than it is 'to allegations of waiver, delay, or like defenses to arbitrability,' which are questions for the arbitrator under *Howsam [v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002)]". 539 U.S. at 457. The dissenting Justices said that since the question of what kind of arbitration proceeding the courts had agreed to was a question for the courts, and not for the arbitrators to decide, this Court could review the consistency of the Supreme Court of South Carolina's determination of that issue with the FAA. The dissenting Justices went on to find that the South Carolina Supreme Court decision was not consistent with the FAA. The dissenting Justices opined that the FAA. requires that agreements to arbitrate be enforced strictly in accordance with their terms. Applying this standard of review, the dissenting Justices found that the arbitrators' choice of class action arbitration contravened a term of the

contract – the term of the contract providing for the selection of the arbitrators. 539 U.S. at 459.

In the instant case, however, unlike the circumstances under review in *Green Tree Financial Corp.* there is no doubt that the issue of the permissibility of termination for failure of the parties to agree on rates – a cause for termination not provided in the Agreement – is a question of substantive arbitrability. The question before the Court is whether the parties agreed to submit to arbitration the matter of whether the Agreement should be terminated for failure of the parties to agree on rates. This is not an issue of whether "the conditions precedent to an obligation to arbitrate have been met", *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002), but rather whether the parties have agreed to submit a particular controversy to arbitration.

This case, then, presents an appropriate vehicle for determining whether the FAA requires that, when the contract is silent as to the matters in controversy, the policy requiring strict enforcement of the terms of a contract applies. It squarely presents the question on which the Petitioners to this Court in *Green Tree Financial Corp.* were seeking the Court's ruling, but this Court was deflected from reviewing because of the procedural nature of the question of what kind of arbitration the parties agreed to.

Moreover, the Guam Supreme Court's Opinion was not based on "independent state grounds". The issue in this case is whether the FAA pre-empts the Guam Supreme Court's application of local Guam law - judicially made law that would allow grounds for termination to be imposed on an arbitration agreement that does not provide for them. See *Volt*, 489 U.S. at 473 & n.4 (explaining that question whether FAA pre-empts state law is a federal question).

Additionally, this Court has held that whether a state court's "interpretation of the contract" "conflicted with the FAA" conferred jurisdiction under 28 U.S.C. §1257. *Id.*

Hence, since this case involves a question of substantive arbitrability, is not based on independent state grounds, and involves a question within the jurisdiction of this Court, this case presents an appropriate vehicle for resolving whether the FAA allows arbitrators, under a broad arbitration clause in a contract, to find that arbitrable contractual rights or obligations exist, in the absence of express provision of those rights or obligations in the contract.

The Issue Whether The FAA Allows Arbitrators, Under A Broad Arbitration Clause, To Find An Arbitrable "Term" Not Otherwise Provided In The Contract Presents An Important And Recurring Issue That Warrants This Court's Review

The question presented here is of great practical importance. Broad arbitration agreements are the norm. Where, as in the instant case, there is no limitation on the issues that can be submitted to the arbitrators, Opinion ¶72, note 17, Pet. App. 53a-54a, the only thing preventing the arbitrators from fashioning rights, obligations and remedies never contemplated by the parties when they signed their contract is the federal policy requiring strict enforcement of the terms of arbitration agreements.

The Opinion of the Supreme Court of Guam holds that, because of the unforseeability of events which might cause a party to want to terminate the contract, it is only right, fair and just for the arbitrators to insert terms in the original contract not contemplated by the parties. This

Opinion holds that various terms may be added to the parties' agreement to arbitrate so long as those procedures do not *directly conflict* with the arbitration agreement. This rule not only grants virtually free reign to trod on the parties' intentions, but also as a result, impairs the ability of parties to enter into workable arbitration agreements, by requiring those agreements to become voluminous in order to preclude every imaginable eventuality. This Court should hold that the Federal Arbitration Act prohibits arbitrators from finding, under a broad arbitration clause in a contract, arbitrable contractual rights and obligations in the absence of an express provision of those rights and obligations elsewhere in the contract.

Dated this 29th day of January, 2005.

OFFICE OF THE ATTORNEY GENERAL

CHARLES T. TROUTMAN
Attorney for Petitioner

IN THE SUPREME COURT OF GUAM

GOVERNMENT OF GUAM AND EDNA T. PAULINO,
Plaintiffs-Appellees,

v.

PACIFICARE HEALTH INSURANCE COMPANY
OF MICRONESIA, INC.,
dba PACIFICARE ASIA PACIFIC,
Defendant-Appellant.

OPINION

Filed: September 14, 2004

Cite as: 2004 Guam 17

Supreme Court Case No.: CVA04-006
Superior Court Case No.: CV1426-03

Appeal from the Superior Court of Guam
Argued and submitted on July 16, 2004
Hagåtña, Guam

Appearing for Defendant-Appellant:
Randall Todd Thompson, *Esq.*
Mair, Mair Spade & Thompson
A Professional Corp.
238 A.F.C. Flores St.
Ste. 801 Pacific News Bldg.
Hagåtña, Guam 96910

Appearing for Plaintiffs-Appellees:
David J. Highsmith, *Esq.*
Special Asst. Atty. Gen.
The Law Office of David J. Highsmith, P.C.
194 Hernan Cortes Ave.
Hagåtña, Guam 96910

BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, JR., Associate Justice; PETER C. SIGUENZA, JR., Justice *Pro Tempore*.

CARBULLIDO, C.J.:

[1] This appeal concerns the 2003 Group Health Insurance Agreement/Health Services Agreement ("Agreement") executed by the Government of Guam ("Government") and PacifiCare Health Insurance Company of Micronesia, Inc., dba PacifiCare Asia Pacific ("PacifiCare"), for group health insurance coverage for Government of Guam employees, retirees and dependents. A dispute arose between the parties regarding coverage under the Agreement for Fiscal Year 2004 ("FY 2004"), and PacifiCare submitted the dispute to arbitration as required under the Agreement. The three-member arbitration panel issued a unanimous award releasing PacifiCare from any further obligation to provide coverage under the Agreement for FY 2004. Upon motion of the Government, the lower court vacated the arbitrators' award. The lower court found that the arbitrators exceeded their authority in relieving PacifiCare from any further obligations under the Agreement, and further found that the arbitration award was made in disregard of the law and did not draw its essence from the Agreement. PacifiCare appeals the lower court's decision vacating the arbitration award. For the reasons stated herein, we reverse.

I.

[2] In November of 2002, PacifiCare and the Government executed a 2003 Group Health Insurance Agreement/Health Services Agreement. The Agreement was a contract for group health insurance for Government of Guam employees, retirees and dependents for Fiscal Year 2003. The Agreement contained an automatic annual renewal provision and general procedures for setting annual rates. The Agreement also provided that disputes arising under the Agreement were to be submitted to arbitration.

[3] During the summer of 2003, the parties engaged in negotiations concerning rates and benefits to be applied to their Agreement for FY 2004. As a result of these negotiations, on August 26, 2003, PacifiCare served a "Notice of Impasse and Demand for Arbitration" ("Demand") upon the Government. The Demand contained four specific enumerated statements of dispute, as follows:

> a. PacifiCare maintains that the Agreement does not permit Defendant to proceed with open enrollment for Fiscal Year 2004 by permitting Government of Guam employees and retirees to select PacifiCare at Fiscal Year 2003 rates and benefits;
>
> b. PacifiCare maintains that under federal law and the Agreement, it is merely required to offer renewal of coverage for Fiscal Year 2004 at rates and benefits that PacifiCare deems appropriate. PacifiCare further maintains that it has fulfilled this obligation by making several offers of renewal and that

PacifiCare's last offer has been expressly rejected by Defendant. As a consequence, PacifiCare has no further obligation to provide any medical or dental coverage for Government of Guam employees and retirees for Fiscal Year 2004; or,

c. In the alternative, if PacifiCare is required to provide any medical or dental coverage to the Government of Guam for Fiscal Year 2004, and PacifiCare does not have the right under federal law or the Agreement to determine the appropriate rates and benefits, then PacifiCare maintains that such rates and benefits must be decided by mutual agreement or binding arbitration; or,

d. In the alternative, if PacifiCare is required to provide any medical or dental services to Government of Guam for Fiscal Year 2004, and the rates and benefits are different than those provided in Fiscal Year 2003, then PacifiCare maintains that the new rates and benefits for Fiscal Year 2004 should be effective as of October 1, 2003.

Appellant's Excerpts of Record ("ER"), vol. I of II, p. 146 (Demand, August 26, 2003).

[4] Prior to arbitration, on September 17, 2003, the Government initiated the underlying case in the Superior Court seeking injunctive relief. In its complaint, the

Government sought a temporary restraining order restraining PacifiCare from publishing any further advertisements notifying Government of Guam employees and retirees of its intention to discontinue coverage as of September 30, 2003, and to retract statements to that effect. The Government also sought a preliminary and permanent injunction requiring PacifiCare to continue health insurance coverage pending the outcome of the arbitration proceedings.

[5] On September 19, 2003, the Superior Court granted the Government preliminary injunctive relief requiring PacifiCare to continue providing insurance coverage to Government of Guam subscribers until further notice of the court.

[6] On September 30, 2003, a one-day arbitration hearing was conducted pursuant to PacifiCare's prior Demand. The parties offered testimony and other evidence. The arbitrators issued a written arbitration award on October 1, 2003. The award provided:

> Pursuant to 1.01.21 of the Arbitration Agreement, the award is hereby rendered.
>
> 1. PacifiCare made offers for renewal of medical coverage for fiscal year 2004 at rates and benefits that PacifiCare deemed appropriate. The Government of Guam did not accept said offers. Under the provisions of the Health Insurance Portability and Accountability Act, 42 U.S.C. 300gg12(a), PacifiCare met its obligations and is under no further obligation to negotiate or to provide any medical health insurance plan to the

Government of Guam for fiscal year 2004.

2. PacifiCare is also relieved of any obligation to renew its contract with the Government under the "continuing clause" in its Agreement with the Government of Guam. Government of Guam v. FHP, Inc., et al., Civ. Nos. CV0809-89, CV0755-89, CV1200-89 and CV1250-89 (Super. Ct. Guam), on Appeal Civ. Nos. 90-00014A, 90-000206A, 90-00040A (D. Guam. App. Div. 1991).

Appellant's Excerpts of Record ("ER"), vol. II of II, p. 393 (Arbitration Award).

[7] PacifiCare filed a motion in the Superior Court to confirm the award. The Government thereafter moved to vacate the award.

[8] On October 20, 2003 the lower court issued a *Disision Yan Otden* ("Decision and Order") vacating the October 1, 2003 arbitration award. The court found that by relieving PacifiCare from any further obligations under the Agreement, the arbitrators exceeded their authority, and further found that the award was made in disregard of the law and failed to draw its essence from the Agreement. The court remanded the matter to the arbitrators to decide appropriate medical benefits and rates between PacifiCare and the Government for FY 2004. On November 5, 2003, PacifiCare moved for reconsideration of the court's order.

[9] On remand, on October 30, 2003, the arbitrators issued a second award. The October 30, 2003 award set rates and

benefits for coverage year FY 2004.[1] PacifiCare thereafter moved to confirm and enforce the October 30, 2003 award, reserving its right to appeal the lower court's October 20, 2003 Decision and Order and to seek damages against the Government for breach of contract. On October 31, 2003, the Superior Court confirmed the October 30, 2003 award in a bench ruling. The parties thereafter proceeded with open enrollment for FY 2004 based upon the rates and benefits set forth in the award issued on remand.

[10] PacifiCare thereafter commenced the instant appeal, and moved to expedite the appeal. The Government opposed the motion to expedite and moved to dismiss the appeal. This court denied the Government's motion to dismiss and granted PacifiCare's request that the appeal be expedited. The Government did not file a cross-appeal.

II.

[11] The Federal Arbitration Act ("FAA") applies to arbitration agreements in contracts involving "commerce in the Territories." 9 U.S.C. § 1 (West, WESTLAW through P.L. 108-279) ("['C]ommerce,' as herein defined, means commerce among the several states . . . or in any territory of the United States . . . or between any such Territory and another, or between any such Territory and any State or foreign nation . . . ."). This phrase has been interpreted as encompassing commerce in Guam. *Kanazawa, Ltd. v. Sound, Unlimited*, 440 F.2d 1239, 1240 (9th Cir. 1971) ("The

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[1] The rates were set as follows, subject to a $750 deductible: (1) Medical - $913.70/month for Class I, $2732.34/month for Classes II and III; (2) Dental - $39.42/month for Class I, $105.77/month for Classes II and III. Apparently twelve individuals opted for PacifiCare coverage at these rates.

question presented is whether commerce in Guam is commerce 'in any Territory of the United States' as the phrase is used in 9 U.S.C. § 1. We think it is."). Contracts concerning insurance constitute "commerce" within the scope of the FAA. *See Utica Mut. Ins. Co. v. Gulf Ins. Co.*, 762 N.Y.S.2d 730, 732 (App. Div. 2003) ("Because insurance transactions constitute commerce within the meaning of the Commerce Clause (*see United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 553, 64 S. Ct. 1162, 88 L. Ed. 1440, *reh. denied* 323 U.S. 811, 65 S. Ct. 26), it is beyond dispute that the Agreement at issue is a contract involving interstate and, indeed, international commerce."); *Mason v. Acceptance Loan Co., Inc.*, 850 So.2d 289, 294 (Ala. 2002) ("Regarding the application of the FAA in the insurance context, we have held: 'Unquestionably, *insurance transactions that stretch across state lines* or intrastate insurance transactions that otherwise have the requisite (substantial) effect on interstate commerce constitute 'Commerce among the several States,' so as to make them subject to regulation by Congress under the Commerce Clause of the United States Constitution.'") (quoting *Southern United Fire Ins. Co. v. Knight*, 736 So. 2d 582, 586 (Ala. 1999) (citing *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 546-47, 64 S. Ct. 1162 (1944) ("holding that an insurer that conducts business across state lines is engaged in interstate commerce")); *Sotka v. Thrivent Fin. for Lutherans*, 2004 WL 1405741, *1 (Wash. Super. 2004) ("[T]he FAA is applicable in this case, because plaintiff's insurance contract with Thrivent involves interstate commerce.").

[12] Accordingly, the FAA applies to the present dispute. *Erickson v. Aetna Health Plan of Cal.*, 84 Cal. Rptr. 2d 76, (Ct. App. 1999) (finding that a breach of a health insurance claim under a contract wherein Aetna would provide replacement Medicare coverage was governed by the FAA

because, among other factors, "Aetna, in performing its Medicare contract, enters into interstate contracts with vendors and service providers operating on a national basis").

[13] This court has jurisdiction over the present appeal pursuant to sections 9(a)(1)(D) and (a)(1)(E) of the FAA, which provide:

> (a) An appeal may be taken from--
> (1) an order—
>
> ...
>
> (D) confirming or denying confirmation of an award or partial award, or
> (E) modifying, correcting, or vacating an award;
>
> . . . .

9 U.S.C. § 16(a)(1)(D)-(E).[2]

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[2] In its Appellee's Brief, the Government raised the defense of sovereign immunity. The Government thereafter conceded the issue during oral argument. Notwithstanding the Government's abandonment of the issue, we nonetheless find the sovereign immunity argument unpersuasive. By entering into an agreement referring disputes to arbitration, the Government is bound by the provisions of such agreement as any other party would, and claim of sovereign immunity is unavailing to prevent enforcement of the agreement. *See Hardie v. United States*, 367 F.3d 1288, 1291 (Fed. Cir. 2004) ("[T]he arbitration clause was part and parcel of the joint venture agreement, and '[a]rbitration agreements are properly viewed as contractual arrangements for resolving disputes.' Consequently, the United States is subject to the arbitration clause of the joint venture agreement just as any private party would be."). This is especially so because the Government not only instituted the underlying action, but sought a temporary restraining order prohibiting PacifiCare from discontinuing coverage to

[14] We review a lower court's order vacating an arbitration award *de novo*. *Teamsters Local Union 58 v. Boc Gases*, 249 F.3d 1089, 1093 (9th Cir. 2001); *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 672 (5th Cir. 2002). The *de novo* "standard is 'intended to reinforce the strong deference due an arbitrative tribunal.'" *Brook*, 294 F.3d at 672 (quoting *McIlroy v. PaineWebber, Inc.*, 989 F.2d 817, 820 (5th Cir.1993)). The lower court's legal rulings in vacating an arbitration award are reviewed *de novo*, while factual findings are reviewed for clear error. *See Sumitomo Constr. Co. v. Zhong Ye, Inc.*, 1997 Guam 8, ¶ 9.

Government of Guam employees prior to the resolution of the dispute by the arbitrators. The Government essentially sought performance of the Agreement *pending arbitration*. We are guided by the reasoning articulated by the Fourth Circuit in *United States v. Bankers Ins. Co.*, 245 F.3d 315, 320 (4th Cir. 2001). The Court stated:

> Put simply, the doctrine of sovereign immunity is not in any way implicated or threatened by the Government's compliance with its contract obligations. When the Government chooses to seek damages in a civil action, it—like all parties—should abide by the law, including an arbitration process to which it is contractually bound.

Id. Here, the Government itself argued before the lower court that the parties should await the outcome of the arbitration. Considering this, it would be "grossly inequitable" for the Government to use sovereign immunity as a sword to negate the arbitration agreement itself. *Ruppenthal v. State, By and Through Econ. Dev. & Stabilization Bd.*, 849 P.2d 1316, 1321 (Wyo. 1993) ("To permit [a recoupment defense] would seem to be no more than simple justice: to deny it the right would be grossly inequitable. No one would assert that in an action by the sovereign, valid legal defenses should be denied the defendant.") (alteration in original). "To allow a state to enter into a contract and then deny the other contracting party a remedy under the contract would be to 'ascribe bad faith and shoddy dealing to the sovereign.'" *State v. Sorensen*, 436 N.W.2d 358, 364 (Iowa 1989).

III.

[15] PacifiCare argues that the lower court erred in vacating the arbitrators' October 1, 2003 award. In its award, the arbitrators decided that PacifiCare was no longer obligated, under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA")[3] or the "continuing clause" of the parties' Agreement,[4] to renew its contract with

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[3] HIPAA was signed into law on August 21, 1996. Health Ins. Portability and Accountability Act, P.L. No. 104-191, H.R. 3103, 104th Congress (1996). "HIPAA imposes new federal law requirements on health insurers (including indemnity carriers, HMOs and BC/BS organizations) that issue health insurance coverage in either the large group market, the small group market, or both, regarding the issuance and renewal of group health insurance." JEFFREY D. MAMORSKY, HEALTH CARE BENEFITS LAW § 16.03 (2004), found at WESTLAW, HCBL, § 16.03. "The Act is primarily designed to make it easier for those who remain continuously covered under employer-sponsored plans to change jobs without having to satisfy new eligibility requirements," and contains provisions for "guaranteed issue and guaranteed renewability." Phyllis C. Borzi, *Health Care Legislation: Implementing HIPAA, The Newborns' and Mothers' Protection Act, the Mental Health Parity Act, and the Women's Health and Cancer Rights Act*, in American Law Institute-American Bar Association Continuing Legal Education, March 30, 2000, Health Plans, HIPAA, and Cobra Update Current ERISA Tax, and Other Issues for Attorneys, Administrators, Insurers, and Consultants, *available at* WESTLAW, VLR993 ALI-ABA 53, 55.

[4] The so-called continuing clause, Paragraph 2.1 of the Agreement, provided:

> Term. This contract, in its original form, became effective August 1, 1973. It shall renew automatically for one year each October 1st unless terminated for major default in availability or quality of services, given by written notice from the Government of Guam to PacifiCare not less than ninety (90) calendar days before the renewal date, or unless modified by mutual agreement.

Appellant's Excerpts of Record, pp. 172-73, vol. II of II (Agreement, § 2.1).

the Government for FY 2004. The lower court vacated the arbitrators' decision in its October 20, 2003 Decision and Order on three primary grounds: (1) the award exhibited a manifest disregard of the law; (2) the arbitrators' decision did not comport with the essence of the Agreement, namely, the continuing clause; and (3) the arbitrators exceeded their authority by determining to terminate the agreement. For the reasons set forth below, we hold that the lower court erred on all three grounds.

A. Standards and Grounds for Vacating an Arbitration Award

[16] "In light of the strong federal policy favoring arbitration, '[j]udicial review of an arbitration award is extraordinarily narrow.'" *Brook*, 294 F.3d at 672 (quoting *Gulf Coast Indus. Worker's Union v. Exxon Co.*, 70 F.3d 847, 850 (5th Cir.1995) (alteration in original)); *see Roubik v. Merill Lynch, Pierce, Fenner & Smith*, 692 N.E.2d 1167, 1171 (Ill. 1998) ("It is well established that judicial review of an arbitral award is intended to be more limited than appellate review of a trial court judgment."). In *Sumitomo Construction Co. v. Zhong Ye, Inc.*, 1997 Guam 8, this court stated that "[w]hen reviewing the decision of a lower court confirming an arbitration award, questions of law are reviewed de novo while questions of fact are reviewed under the clearly erroneous standard." *Id.* at ¶ 9 (citing First Option of Chicago, Inc., v. Kaplan, 514 U.S. 938 (1995)). The *Sumitomo* court further held that "[t]hese same standards apply to the trial court's review of the arbitrator's award." *Id.* (citing Carpenters Pension Trust v. Underground Construction Co., 31 F.3d 776 (9th Cir. 1994)). This latter pronouncement relates to the question of the standards applicable to the lower court in reviewing the arbitrators' award. We do not interpret this pronouncement in *Sumitomo* as indicating that arbitration awards may be reviewed freely

under the *de novo* and clearly erroneous standards without regard to the well-established policy considerations favoring arbitration. *See Automated Tracking Sys., Inc. v. Great Am. Ins. Co.*, 719 N.E.2d 1036, 1041 n.2 (Ohio Ct. App. 1998). With regard to the standards applicable in determining whether to vacate an arbitration award, the *Sumitomo* court further clarified:

> In arbitration cases decided under the [FAA] . . . the scope of review is quite narrow. This is complementary to a policy favoring consensual agreements and guaranteeing enforcement of contractual terms between the parties. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985). Although a serious question may arise as to the arbitrator's view of the law, an award "will not be set aside by a court for error either in law or fact ... if the award contains the honest decision of the arbitrators, after a full and fair hearing of the parties." *Coast Trading Co., Inc. v. Pacific Molasses Co.*, 681 F.2d 1195, 1198 (9th Cir. 1982) (citations omitted). In other words, "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, a court's conviction that the arbitrator made a serious mistake or committed grievous error will not furnish a satisfactory basis for undoing the decision." *Advest, Inc. v. McCarthy*, 914 F.2d 6, 9 (1st Cir. 1990) (citations omitted).

Sumitomo Constr. Co., 1997 Guam 8 at ¶ 10. Thus, while as a general matter legal determinations are reviewed *de novo* and factual determinations are reviewed for clear error, an

application of these general standards of review does not support vacating an arbitrator's decision absent the recognized narrow circumstances warranting vacatur. *See Automated Tracking Sys., Inc.*, 719 N.E.2d at 1041 n.2 ("While we will review the trial court's order vacating the arbitrators' award *de novo*, . . . we decline to review the arbitrators' award itself *de novo*."); *Local Joint Executive Bd. of Las Vegas v. Riverboat Casino, Inc.*, 817 F.2d 524, 526 (9th Cir. 1987) ("This court reviews *de novo* the district courts grant of summary judgment confirming the arbitration award. The district court's review of the arbitral award is, however, limited.") (citation omitted).

17] Section 10 of the FAA enumerates the grounds wherein a court may vacate an arbitration award. It provides:

> **(a)** In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration-
>
> **(1)** where the award was procured by corruption, fraud, or undue means;
>
> **(2)** where there was evident partiality or corruption in the arbitrators, or either of them;
>
> **(3)** where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other

> misbehavior by which the rights of any party have been prejudiced; or
>
> **(4)** where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. . . .

9 U.S.C. § 10 (West, WESTLAW through P.L. 108-279).[5]

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[5] In its October 20, 2003 Decision, the lower court relief upon Guam's Civil Arbitration Law, including section 42108 of Title 7 of the GCA, in determining whether to vacate the arbitrator's award. The lower court did not cite or rely upon section 10(a) of the FAA. Section 42108 of Title 7 of the GCA, Guam's Civil Arbitration Law, which governed the standard for vacating an arbitration award at the time of the lower court's October 20, 2003 Decision, mirrors exactly section 10 of the FAA. *See* Title 7 GCA § 42108 (1993). This court has recognized, in *Sumitomo,* that section 42108 was patterned after the United States Arbitration Act, which is the predecessor statute of the FAA. *See Sumitomo Constr. Co.,* 1997 Guam 8 at ¶ 5 ("A review of the legislative drafts concerning Guam's arbitration statutes indicates that they were patterned after the United States Arbitration Act found in Title 9 of the United States Code Annotated. §§ 1-14 (1970) . . . . In particular, the Guam provisions addressing vacation of arbitration awards mirror exactly the corresponding federal statutes."). In *Sumitomo,* we further found that because the Legislature modeled our statute after the federal statute, "[w]e can properly assume that the legislature meant to adopt the federal construction of Guam's arbitration statutes. . . ." *Id.* At ¶ 8.

Our statute was patterned after section 10 of the FAA, therefore, federal cases interpreting the FAA are persuasive on this court's construction of section 42108. *Id.* The FAA applies in the present dispute. Because we interpret the local statute, section 42108 of Title 7 of the GCA, in the same a manner as our interpretation of section 10 of the FAA, the lower court's decision made pursuant to section 42108 will be reviewed as having been made pursuant to section 10 of the FAA. *See Volt Info. Sciences, Inc. v. Bd. Of Trustees of Leland Stanford Jr. Univ.,* 489 U.S. 468, 477, 109 S. Ct. 1248, 1255 (1989) (recognizing it prior

[18] In addition to the grounds set forth in the FAA, there exist several judicially-created grounds for vacating an award. *See* Sumitomo Constr. Co., 1997 Guam 8 at ¶ 19 (recognizing that courts have vacated arbitration awards based on a "manifest disregard of the law" which is "not statutory but rather a judicially recognized federal exception introduced by the United States Supreme Court in *Wilko v. Swan*, 346 U.S. 427, 436-37, 74 S. Ct. 182, 98 L. Ed. 168 (1953), *overruled on other grounds by Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989)"); *Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001) (stating that in addition to the circumstances enumerated under section 10 of the FAA, "[w]e have also recognized 'a handful of judicially created reasons' that a district may rely upon to vacate an arbitration award . . . ."). The commonly recognized non-statutory grounds include "[1] a 'manifest disregard' of the law by the arbitrator, [2] a conflict between the award and a clear and well established 'public policy,' [3] an award that is 'arbitrary and capricious' or 'completely irrational,' and [4] a failure of the award to 'draw its essence' from the parties' contract." Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 739 (Spring 1996) (describing the aforementioned as

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holding that the substantive provisions of the FAA apply in both state and federal courts); *Dakota Weslevan Univ. v. HPG Int'l, Inc.*, 560 N.W.2d 921, 922 (S.D. 1997) (holding that the FAA "preempts state law and governs all written arbitration agreements in contracts involving interstate commerce."); *Safeway Stores, Inc. v. Brotherhood of Teamsters*, 83 Cal.App.3d 430, 436, 147 Cal. Rptr. 835, 838 (Cal. Ct. App. 1978) (applying federal law after "[r]ecognizing California's arbitration statutes (Code Civ.Proc., s 1280 et seq.), *especially those governing the scope of judicial review of an arbitrator's award and the grounds for vacation of an award* (Code Civ.Proc., s 1286.2), having 'considerable substantive as well as procedural significance'") (emphasis added). We thus rely on authority interpreting and applying section 10 of the FAA in reviewing whether the lower court correctly vacated the arbitrators' award.

the "primary . . . nonstatutory grounds") (footnotes omitted); *see also Sheldon*, 269 F.3d at 1206 (stating that some recognized exceptions that a district court may rely upon "include violations of public policy, manifest disregard of the law, and denial of a fundamentally fair hearing."); *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 27 (2d Cir. 2000) (recognizing that in addition to the grounds set forth in section 10(a) of the FAA, "judicial interpretation has added additional grounds, such that awards may be vacated under limited circumstances where the arbitrators manifestly disregarded the law or where enforcement would violate a 'well defined and dominant public policy'") (citation omitted).

[19] Federal courts have not ruled consistently on whether an arbitration award may be vacated for reasons other than those set forth under section 10 of the FAA. Hayford, *supra*, at 746 ("There is substantial disagreement among the United States circuit courts of appeals as to whether the statutory grounds for vacatur set out in Section 10(a) of the FAA should be augmented by judicially fashioned standards for review.")[6]; *see also George Watts & Son, Inc. v. Tiffany and*

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[6] The author summarized the state of the law on this issue as follows:

> Only the Fourth Circuit has unequivocally rejected the nonstatutory grounds for vacatur.
>
> ...
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> Four circuit courts of appeals can be described as being in a state of extreme confusion with regard to the non-statutory grounds for vacatur: the Sixth, Ninth, Fifth, and Seventh. The case law in each of those four circuits contains one or more unequivocal assertions that the exclusive grounds for vacatur of commercial arbitration awards are those set forth in section 10(a) of the FAA, juxtaposed with one or more opinions recognizing and applying a non-statutory ground for vacatur.
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> ...
>
> [T]he remaining federal circuit courts of appeals—the First, Second, Third, Eighth, Tenth, Eleventh, and District of Columbia Circuits—have clearly recognized one or more of the nonstatutory

Co., 248 F.3d 577, 579-580 (7th Cir. 2001) (explaining that the law in the Seventh Circuit and "in other circuits is similarly confused" in whether the manifest disregard of the law standard is an independent reason to set aside an arbitration award). This court has never squarely decided whether the grounds set forth in section 10 are the exclusive grounds for vacating an arbitration award. *Cf.* Sumitomo Constr. Co., 1997 Guam 8 at ¶ 20 (leaving open the question of whether the "manifest disregard for the law" applied as an exception to the grounds set forth in the Commercial Arbitration Law, Section 42107 of Title 7 of the GCA, and finding that while legal authority existed to enable the court to adopt the exception in this jurisdiction, "at this time we are not presented with the proper justification necessitating our adoption and use of the manifest disregard exception.").

[20] The lower court relied upon both statutory and non-statutory grounds in vacating the arbitrators' award. We therefore review the court's reliance on both categories of grounds. A discussion of all three specific grounds relied upon by the lower court is presented below in relation to the relevant issues in this appeal.

B. The Lower Court's Decision

1. Arbitrability of the termination issue

[21] In its October 20, 2003 Decision and Order, the lower court found that the arbitrators exceeded their authority by addressing the issue of termination. ER, vol. II of II, p. 426

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grounds for vacatur of commercial arbitration awards, without having embraced in another opinion (earlier or later) the "exclusivity" view of Setion 10(a) of the FAA. Thus, they can be placed in the "nonstatutory grounds" category.

Hayford, *supra*, at 764-65, 774 (footnotes omitted).

(Decision and Order, October 20, 2003, p. 26). The lower court cited Enclosure 9A of the administrative procedures governing the negotiations for FY 2004, which provided that "[a] request for arbitration shall be confined to those issues to which resolutions was earnestly sought at the negotiating table but was not reached." ER, vol. II of II, p. 417 (Decision and Order, p. 17, October 20, 2003) (quoting Enclosure 9A, ¶ I(4)). The court stated that "[b]ased upon Enclosure 9A, the arbitrators were bound to decide the only issue which resulted in an impasse, i.e., medical coverage." ER, vol. II of II, p. 426 (Decision and Order, October 20, 2003, p. 26). The court concluded that the arbitrators exceeded their authority by concluding that PacifiCare was no longer required to provide medical or dental coverage under its Agreement with the Government of Guam because the "award must be limited to issues which created an impasse and not others." ER, vol. II of II, p. 426 (Decision and Order, October 20, 2003, p. 26).

[22] By determining that the arbitrators' authority was limited by the procedural requirements of Enclosure 9A, the lower court's decision implicated the issue of arbitrability. The lower court essentially determined that the issues of continued coverage or termination were not arbitrable.

[23] Under section 10(a)(4) of the FAA, a lower court may vacate an arbitration award when the arbitrators exceed their authority. 9 U.S.C. § 10(a)(4). An arbitrator exceeds his authority when he "arbitrate[s] a dispute that is not arbitrable in the first place." *State v. R.I. Alliance of Soc. Servs. Employees, Local 580, SEIU*, 747 A.2d 465, 468 (R.I. 2000).

[24] "It is a long-standing principle of consensual arbitration that the nature and scope of an arbitration panel's authority is determined by the language of the arbitration clause." *Lupone v. Lupone*, 848 A.2d 539, 541 (Conn. Ct.

App. 2004); *see also Kiefer Specialty Flooring, Inc. v. Tarkett, Inc.*, 174 F.3d 907, 909 (7th Cir. 1999) ("Whether a particular issue is subject to arbitration is a matter of contract interpretation, because 'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'") (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347 (1960)). Thus, "[t]he contours of the arbitrator's powers are determined by reference to the parties' agreement to arbitrate and their submission to arbitration. They are not ascertained by judicial determinations of the types and degrees of error (law, fact, or contract interpretation) that will be, or rightfully should be, tolerated without voiding the award." Hayford, *supra*, at 825; *see also Moncharsh v. Heily & Blase*, 832 P.2d 899, 916 (Cal. 1992) ("It is well settled that 'arbitrators do not exceed their powers merely because they assign an erroneous reason for their decision.' A contrary holding would permit the exception to swallow the rule of limited judicial review; a litigant could always contend the arbitrator erred and thus exceeded his powers.") (citation omitted).

[25] The lower court reviewed the issue of arbitrability independently and determined that the arbitrators were not permitted under the Agreement to determine the issue of continued coverage. We find that the lower court erred in this regard. In reviewing the lower court's decision, we are required to distinguish between issues reserved for determination by the courts and those reserved for the arbitrators.

[26] The United States Supreme Court has clarified, "[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v.*

Kaplan, 514 U.S. 938, 944, 115 S. Ct. 1920, 1924 (1995). However, several presumptions apply when interpreting a contract containing an agreement to arbitrate. First, "strong support for the federal policy favoring arbitration exists[,]" and "the FAA 'establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" *Kiefer Specialty Flooring, Inc.*, 174 F.3d at 909 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927 (1983)); *see also Sumitomo Constr. Co.*, 1997 Guam 8 at ¶ 14 ("[A]ny doubt as to the arbitrator's jurisdiction is resolved in favor of arbitration."). Stated another way, ambiguities regarding the question of "*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement" are construed in favor of arbitration. *See First Options*, 514 U.S. at 944-45, 115 S. Ct. at 1924 (determining that before concluding that the parties intended that an issue not be arbitrated, the intent to exclude such issues from arbitration must be clear); *see also United States v. Bankers Ins. Co.*, 245 F.3d 315, 319 (4th Cir. 2001) ("[I]n applying common law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the FAA, due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.") (brackets omitted) (quoting *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 475-76, 109 S. Ct. 1248 (1989)); *Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314, 1320-21 (5th Cir. 1994) ("In deciding whether the arbitrator exceeded its authority, we resolve all doubts in favor of arbitration."); *Roubik*, 692 N.E.2d at 1172 ("[I]n reviewing an arbitrability question, courts are bound to apply the established federal policy favoring arbitration and to resolve any doubts concerning the scope of arbitrable issues in favor of arbitration."); *Kiefer Specialty Flooring, Inc.*, 174

F.3d at 909 ("[A] court may not deny a party's request to arbitrate an issue 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'") (quoting *United States Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83, 80 S. Ct. 1347 (1960)).

[27] Second, on the question of *who* determines arbitrability, the law "reverses the presumption" favoring arbitrability. *First Options*, 514 U.S. at 945, 115 S. Ct. at 1924. The question of whether a claim or dispute is arbitrable is generally considered one for the courts, and not the arbitrators, unless the parties clearly and unmistakably reserved the question for the arbitrators. *See id.* (explaining that in deciding "whether a party has agreed that arbitrators should decide arbitrability," "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so.") (brackets omitted); *see also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S. Ct. 588, 592 (2002). Courts may conduct an independent determination of the question of arbitrability if the parties have not clearly agreed that the question of arbitrability is to be determined by the arbitrator. *See Roubik*, 692 N.E.2d at 1172 ("Under the FAA and the case law interpreting it, the question of whether a claim is arbitrable is to be independently decided by the courts, unless the parties 'clearly and unmistakably' agree to allow the arbitrator to decide arbitrability.") (alteration omitted).

[28] Any "potentially dispositive" inquiry related to whether a requirement for arbitration has been fulfilled could be considered, "linguistically speaking," a "'question of arbitrability'," to the extent that "its answer will determine whether arbitration will proceed on the merits." *Howsam*, 537 U.S. at 83, 123 S. Ct. at 592. However, the clear and

unmistakable standard applies only to determining who decides certain questions of arbitrability, including "whether the parties are bound by a given arbitration clause," and "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." *Id.*, 537 U.S. at 84, 123 S. Ct. at 592.

[29] By contrast, "'procedural' questions which grow out of the dispute and bear on its final disposition' are presumptively *not* for the judge, but for an arbitrator, to decide." *Id.* (quoting *John Wiley & Sons Inc. v. Livingston*, 376 U.S. 543, 557, 84 S. Ct. 909 (1964)). Citing comments to the Revised Uniform Arbitration Act, the Court in *Howsam* recently clarified that "in the absence of an agreement to the contrary, issues of substantive arbitrability . . . are for a court to decide and issues of procedural arbitrability, *i.e.*, whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." *Id.* 537 U.S. at 85, 123 S. Ct. 588 at 592 (emphasis omitted).

[30] Thus, unlike questions of substantive arbitrability, which may be reviewed by courts independently absent a clear and unmistakable intent by the parties otherwise, courts apply a deferential standard to an arbitrator's decision on issues related to procedural requirements for arbitrability. *See Kennecott Utah Copper Corp. v. Becker*, 186 F.3d 1261, 1267-68 (10th Cir. 1999). Specifically, "if a party submits a question of procedural arbitrability to an arbitrator, a court will not later review the issue *de novo*, but will instead defer to the arbitrator's resolution in the same way it defers to his or her ruling on the merits." *Id.* at 1267 (citing the holding of *First Options*' that if the parties agreed to submit the arbitrability question to arbitration, "then the court's standard for reviewing the arbitrator's decision about that matter

should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate."). "This rule of deference is founded on the recognition that '(1) procedural questions are often intertwined with the merits of the dispute and (2) the reservation of procedural issues for the courts provides an opportunity for serious delay and duplication of effort." *Stroh Container Co. v. Delphi Indust., Inc.*, 783 F.2d 743, 748-49 (8th Cir. 1986).

[31] The lower court here conducted an independent review of the whether the arbitrators could decide the question of termination, giving no deference to the arbitrators' decision. We review *de novo* "whether the issue of arbitrability is for the court or for the arbitrator." *Bell v. Cendant Corp.*, 293 F.3d 563, 565-66 (2d Cir. 2002). We find that the lower court erred in determining arbitrability independently of the arbitrators' decision.

[32] In *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 84 S. Ct. 909 (1964), the Supreme Court faced the issue of whether the court or the arbitrator should decide the question of whether the dispute resolution requirements and procedures in the parties' contract were met. In *John Wiley*, two companies, John Wiley and Interstate, merged. *Id.*, 376 U.S. at 544-45, 84 S. Ct. at 912. Prior to the merger, many of Interstate's employees were members of a union and received the benefits of a collective bargaining agreement ("CBA"). *Id.* A dispute arose between the union and John Wiley as to whether the collective bargaining agreement survived the merger. *Id.* John Wiley argued that it did not, while the union argued that the employees had vested rights under the CBA notwithstanding the merger. *Id.* Prior to the expiration of the agreement, the union commenced an action in court to compel arbitration. *Id.* The Supreme Court was presented with two issues: (1) who should decide whether the

arbitration provisions in the CBA survived the merger; and (2) who should decide whether certain grievance procedures required prior to commencing arbitration have been met. *Id.*, 376 U.S. at 544, 84 S. Ct. at 911. The Court held that the first question, which was related to whether the parties were "bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties." *Id.*, 376 U.S. at 547, 84 S. Ct. at 913. On the second issue, however, the Court found the opposite - that the arbitrators should decide the issue.

[33] Specifically, in *John Wiley*, the CBA enumerated a three-step process for determining disputes. Step 1 required a conference between the employee, union steward, and employer. *Id.*, 376 U.S. at 555-56, 84 S. Ct. at 917. Under Step 2, the grievance was to be submitted to an officer of the employer and a union shop committee, and/or a representative from the union. *Id.*, 376 U.S. at 556, 84 S. Ct. at 917. Under Step 3, the parties would arbitrate the dispute "in the event that the grievance should not be resolved or settled in Step 2." *Id.*, 376 U.S. at 556, 84 S. Ct. at 917. On appeal, John Wiley argued that since the first two steps were not followed, "it has no duty to arbitrate this dispute." *Id.* John Wiley further argued that "whether 'procedural' conditions to arbitration have been met must be decided by the court and not the arbitrator." *Id.*, 376 U.S. at 556, 84 S. Ct. at 918. The Supreme Court disagreed, finding that the issues regarding compliance with the grievance procedures were intertwined with the merits because the procedural prerequisites "develop in the context of an actual dispute about the [r]ights of the parties to the contract or those covered by it." *Id.*, 376 U.S. at 556-57, 84 S. Ct. at 918. The Court explained:

> Doubt whether grievance procedures or some part of them apply to a particular dispute,

> whether such procedures have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration. . . . It would be a curious rule which required that intertwined issues of 'substance' and 'procedure' growing out of a single dispute and raising the same questions on the same facts had to be carved up between two different forums, one deciding after the other. Neither logic nor considerations of policy compel such a result.

Id., 376 U.S. at 557, 84 S. Ct. at 918. The Court held: "Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *Id.*

[34] In the case *sub judice*, the lower court identified the subject matter of the dispute as involving PacifiCare's continued obligation to provide coverage for FY 2004. The parties' Agreement broadly provided: "*Any dispute or controversy* between the parties arising under this Agreement shall be submitted to binding arbitration." Appellant's ER, vol. II of II, p. 217 (Agreement, Attachment III, § 1.01). In light of this broad language, a dispute concerning whether PacifiCare could be released from its obligations was a subject matter which was arbitrable under the parties' Agreement. Furthermore, there is nothing in the Agreement which excluded the issue of termination from resolution pursuant to the arbitration clause.

[35] Thus, "[o]nce it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *John Wiley*, 376 U.S. at 557, 84 S. Ct. at 918.

[36] Here, the lower court cited Enclosure 9A(I)(4) which provided that "[a] request for arbitration shall be confined to those issues to which resolutions was earnestly sought at the negotiating table but was not reached." Supplemental Record on Appeal, (Decl. of David A. Mair, Ex. A). The lower court apparently interpreted the language as a limitation to the arbitrators' powers, specifically, that the arbitrators were only authorized to decide issues which the parties were at an impasse. The lower court's decision was grounded in its determination that the parties had not reached an impasse on the issue of termination. Similar to *John Wiley*, this question of whether the dispute resolution requirements and procedures were met was one for the arbitrators. *See John Wiley*, 376 U.S. at 557, 84 S. Ct. at 918 (holding that the arbitrators, and not the court, should decide the issue of whether the parties complied the grievance procedures which were prerequisites for arbitration). Questions of whether the parties negotiated and reached an impasse on an issue submitted for decision by the arbitrators necessarily "develop in the context of an actual dispute about the [r]ights of the parties to the contract or those covered by it." *Id.*, 376 U.S. at 556-57, 84 S. Ct. at 918.

[37] Furthermore, our characterization of the issue here as falling within the realm of procedural arbitrability is supported by the rationale for the respective presumptions applicable when interpreting an arbitration agreement. As the Supreme Court has explained, the question of ***whether*** a merits-related dispute is arbitrable

> arises when the parties have a contract that provides for arbitration of some issues. In such circumstances, the parties likely gave at least some thought to the scope of arbitration. And, given the law's permissive policies in respect to arbitration, one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter. On the other hand, the former question - the "who (primarily) should decide arbitrability" question-is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers. And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.

First Options, 514 U.S. at 945, 115 S. Ct. at 1924-25 (citations omitted). Thus, as the Court in *First Options* explained, where the question is who decides arbitrability, it is possible that the parties did not think the arbitrator would decide the question. *Id.* This is because by including an arbitration clause, the parties were likely only contemplating that the issues before the arbitrator would relate to the merits of the dispute brought *pursuant to the arbitration clause*, and not whether a dispute fell within the clause to begin with. Such reasoning is sensible where the precise question is who

decides substantive questions of arbitrability, such as whether the subject matter of the dispute falls within the arbitration clause. By contrast, here, the provisions identified by the lower court are the procedures of Enclosure 9A. By including a broad arbitration clause in the Agreement mandating arbitration of "any dispute or controversy arising under the Agreement," and by making the requirements of Enclosure 9A part of the negotiation process under the Agreement, the parties would "likely expect that an arbitrator would decide the gateway matter" of whether the *otherwise arbitrable subject* could be addressed in light of the procedural requirements of Enclosure 9A. *Howsam*, 537 U.S. at 84, 123 S. Ct. at 592; *cf. Abram Landau Real Estate v. Benova*, 123 F.3d 69, 74 (2d Cir. 1997) (finding that the arbitrator, and not the courts, should determine whether arbitration was barred by the evergreen clause in the parties' contract, and concluding that because the agreement "contained a broad arbitration clause submitting to arbitration *all* disputes between the parties *involving* the interpretation of any provision of the Agreement[, the] provision surely cover[ed] a dispute involving the validity of the 'evergreen clause' and, therefore, is a proper subject for arbitration").[7]

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[7] We note the cases of *HIM Portland, LLC v. Devito Builders, Inc.*, 317 F.3d 41 (1st Cir. 2003), and *White v. Kampner*, 641 A.2d 1381 (Conn. 1994), but determined that they do not compel us to reach a contrary conclusion. In *HIM*, the First Circuit affirmed the district court's decision denying a motion to compel arbitration where the parties did not first request mediation as required under the contract. *HIM*, 317 F.3d at 44. Notably, the *HIM* court did not address the issue of whether the court or the arbitrators should decide whether a condition precedent to arbitration was satisfied. We thus do not find the case instructive. In *White*, the Connecticut Supreme Court affirmed the trial court's decision that the mandatory negotiation clause in the parties' agreement was a condition precedent to arbitration, and that "this arbitrability issue was one for the courts to determine, not the arbitrators." *White*, 641 A.2d at 1385. We find *White* distinguishable because there, the parties' contract

[38] Thus, while it was within the lower court's province to review whether the arbitrators exceeded their authority, in conducting this review, the lower court should have given the appropriate deference to the arbitrators' decision on the issue regarding compliance with the procedural prerequisites for arbitration of a particular issue. *See Major League Umpires Ass'n v. American League of Professional Baseball Clubs*, 357 F.3d 272, 279 (3d Cir. 2004).[8]

[39] By releasing PacifiCare from any further obligation under the Agreement, the arbitrators presumably and implicitly found that the procedural requirements for determining the issue, including the requirement of an impasse, were met. Given the deferential standard of review of the arbitrators' decisions, we cannot conclude that the arbitrators' decision to consider and decide the issue of termination contained a defect which would warrant setting that decision aside under any of the limited grounds for vacating an arbitration award. In fact, there is evidence in the record which supports the arbitrators' decision. In its Demand, PacifiCare indicated that the parties were at an impasse as to medical rates, and requested that it be released from any further obligation under the Agreement. In its arbitration brief, PacifiCare further elaborated that prior to

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did not contain a broad and unlimited arbitration clause; rather, the arbitration provision in the parties' contract contained the qualification that negotiation be conducted as a condition of arbitrability. *See id.* At 1385 n.10. Moreover, assuming the *White* case is not limited to its facts, we are not otherwise persuaded by the court's holding to the extent that it conflicts with our reasoning set forth in the body of this opinion.

[8] The requirements set forth in Enclosure 9A regarding negotiation do not affect our decision that procedural arbitrability questions are for the arbitrators. A reading of Enclosure 9A reveals that the procedures set forth therein are related solely to issues raised during negotiations for coverage for FY 2004, and not other issues, such as questions of arbitrability, which may arise under the agreement.

arbitration, the parties discussed the issue of continued coverage for FY 2004. There is nothing in the record that would support overturning the arbitrators' decision under either section 10 of the FAA, or any judicially-recognized ground for vacating an arbitration award. *See Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192, 1195 (7th Cir. 1987) (stating that an arbitration award may only be set aside in the limited circumstances where the arbitrators "don't interpret the contract" or if their decision "is infected by fraud or other corruption"). Accordingly, the lower court's contrary independent finding was in error.

[40] The dissent argues that the lower court's decision under section 10(a)(4) should be affirmed on other grounds. Specifically, the dissent contends that other terms of the parties' Agreement revealed an intent that the issue of termination was not within the arbitrators' authority to decide. We disagree.

[41] The dissent first contends that several provisions of the Agreement limit the scope of the arbitration clause, including the provisions which instruct that arbitrators may only decide issues identified in the arbitration notice and which bind the arbitrators to the Agreement. The dissent further identifies provisions of the Agreement which restrict issues in litigation to those not submitted to arbitration, and which clarifies that the arbitration procedures in the Agreement do not change the effect of the Appellate Division case *Government of Guam v. FHP, Inc.* (Civil Case No. 90-00014A). These provisions of the Agreement do not limit the scope or subject matters cognizable under the arbitration clause. Furthermore, the provisions identified by the dissent are not relevant here. The circumstances covered by the aforementioned provisions are not present in the case *sub judice*.

[42] The dissent also identifies the automatic renewal clause as affecting the outcome of this case. Paragraph 2.1 of the Agreement provided:

> Term. This contract, in its original form, became effective August 1, 1973. It shall renew automatically for one year each October 1st unless terminated for major default in availability or quality of services, given by written notice from the Government of Guam to PacifiCare not less than ninety (90) calendar days from the renewal date, or unless modified by mutual agreement.

Appellant's ER, p. 172, vol. II of II (Agreement, ¶2.1).[9]

[43] We do not find the automatic renewal provision to render the question of termination non-arbitrable. The automatic renewal provision evidences an intent that

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[9] Similar provisions requiring continued coverage are set forth by statute. *See* Title 4 GCA §4301(g)(1996); 42 U.S.C. §300gg-12(a). Title 4 GCA §4301(g) states that the Governor shall:

> incorporate the continuing provision clause made available to [GMHP], FHP, Inc. and Staywell, which was the subject of the District Court of Guam Appellate Division Case *Government of Guam v. FHP, Inc.*, (D.Guam App. Div. 1991), in the government's group health insurance agreement with any health insurance company . . . which has contracted with the government of Guam for at least two (2) consecutive years.

4 GCA §4301(g)(1996). Title 42 U.S.C. §300gg-12(a) of HIPAA provides:

> Except as provided in this section, if a health insurance issuer offers health insurance coverage in the small or large group market in connection with a group health plan, the issuer must renew or continue in force such coverage at the option of the plan sponsor of the plan.

42 U.S.C. §300gg-12(a).

coverage be renewed automatically. It does not evidence an intent that the Agreement could never be terminated, or that a dispute as to whether termination is warranted is not arbitrable. Furthermore, the fact that the Agreement enumerates specific circumstances where termination is allowed does not alter our conclusion that the issue of termination was within the arbitrators' authority to decide. The circumstances enumerated in the Agreement warranting a termination of coverage does not reveal an intent that only those circumstances be submitted for determination by the arbitrators. The question of whether PacifiCare was obligated to continue coverage, or could terminate coverage, was a subject matter which could be considered by the arbitrators *specifically because* termination was permitted under the Agreement and law applicable to the Agreement. Whether or not termination was warranted under the facts viewed against the Agreement and relevant statutes goes to the merits of the dispute - a question explicitly reserved for the arbitrators in light of the parties' broad arbitration clause. It would be incongruous to conclude that by specifying instances where termination would be allowed, the parties necessarily intended to exclude from arbitration questions of termination which were not specified in the Agreement but otherwise arose out of the contract. The parties cannot be expected to anticipate every possible issue or dispute that could arise, or every possible remedy for a dispute. In determining the parties' intent regarding the matters to be arbitrated, it suffices to view the arbitration clause and any other provision in the contract which explicitly excludes certain subjects from arbitration. Here, the arbitration clause required that "*Any dispute or controversy* between the parties arising under this Agreement shall be submitted to binding arbitration." Appellant's ER, vol. II of II, p. 217 (Agreement, Attachment III, § 1.01). The Agreement contains no limitation on the subject matters which may be submitted to arbitration. The parties' intent could not be clearer. The

question of termination where the parties could not agree as to rates arose out of the Agreement. Therefore, the question was within the arbitrators' authority to decide.

2. Non-Statutory Grounds

[44] We next consider whether the lower court erred in vacating the arbitrators' award based on other grounds. The lower court found that the arbitrators erred as a matter of law in concluding that PacifiCare was not obligated to provide coverage for FY 2004 under either HIPAA or the Agreement. ER, vol. II of II, pp. 423-24 (Decision and Order, October 20, 2003, pp. 23-24). The lower court concluded that such legal error supported vacating the arbitrators' award on the ground that it was made in manifest disregard of the law, and was contrary to the essence of the parties' Agreement. We disagree.

a. Manifest Disregard of the Law

[45] This court in *Sumitomo Constr. Co. v. Zhong Ye Inc.*, recognized that courts have vacated arbitration awards based on a "manifest disregard of the law," which is "not statutory but rather a judicially recognized federal exception introduced by the United States Supreme Court in *Wilko v. Swan*, 346 U.S. 427, 436-37 . . . (1953)." *Sumitomo Constr. Co.*, 1997 Guam 8 at ¶ 19 (quoting *Todd Shipyards Corp. v. Cunard Line Ltd.*, 943 F.2d 1056 (9th Cir. 1991)). In fact, it has been recognized that "[m]anifest disregard of the law is the seminal non[-]statutory ground for vacatur of commercial arbitration awards." Hayford, *supra*, at 774.

[46] As recognized in *Sumitomo*, the Second Circuit has described the exception as follows:

> "Although the bounds of [the manifest disregard of the law] ground have never been defined, it clearly means more than error or misunderstanding [by the arbitrator] with respect to the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it. . . . Judicial inquiry under the "manifest disregard" standard is therefore extremely limited. The governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable.

Sumitomo Constr. Co., 1997 Guam 8 at ¶ 19 (quoting *Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int'l, Ltd.*, 888 F.2d 260, 265 (2d Cir. 1989)).

[47] Courts agree that "[m]anifest disregard of the law means something more than just an error in the law or a failure on the part of the arbitrators to understand or apply the law." *Luong v. Circuit City Stores, Inc.*, 368 F.3d 1109, 1112 (9th Cir. 2004) (quoting *Mich. Mut. Ins. Co. v. Unigard Sec. Ins. Co.*, 44 F.3d 826, 832 (9th Cir.1995)); *see also Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000) ("An arbitration decision must fly in the face of established legal precedent for us to find manifest disregard of the law.") (quotation marks omitted). "We are not at liberty to set aside an arbitration panel's award because of an arguable difference regarding the meaning or applicability of laws urged upon it." *Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int'l, Ltd.*, 888 F.2d 260, 265 (2d Cir. 1989). "An

arbitration panel acts with manifest disregard if (1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle." *Dawahare*, 210 F.3d at 669 (quotation marks omitted). "It must be clear from the record that the arbitrators recognized the applicable law and then ignored it." *Luong*, 368 F.3d at 1112 (quoting *Mich. Mut. Ins. Co. v. Unigard Sec. Ins. Co.*, 44 F.3d 826, 832 (9th Cir.1995)).

[48] This court has never explicitly adopted the manifest disregard of the law standard as a proper ground for vacating an arbitration award. Arbitration awards are widely tested against this standard by courts in other jurisdictions, and we herein adopt this standard as a valid basis for vacating an arbitration award in this jurisdiction. We find the manifest disregard ground to fall within the rubric of a statutory ground, section 10(a)(3) of the FAA, which allows a court to vacate an arbitration award "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or any other misbehavior by which the rights of any party have been prejudiced." 9 U.S.C. § 10(a)(3). An arbitrator that "refuses to hear evidence pertinent and material to the controversy," *id.*, commits the same type of prejudicial misconduct as an arbitrator that is aware of applicable law and consciously refuses to apply the law. In light of the stringent test required to demonstrate a manifest disregard of the law, we hold that an arbitration award made in manifest disregard of the law rises to the level of "misbehavior by which the rights of a[ ] party have been prejudiced" under 9 U.S.C. § 10(a)(3). *Id.*

[49] In the present case, the lower court found that the arbitrators disregarded the law by failing to consider the importance of the continuing clause in the parties' contract. This conclusion is not supported by the record. PacifiCare

correctly points out that HIPAA and the continuing clause in the parties' Agreement were presented to the arbitrators for review. Both parties addressed these provisions in relation to the dispute in their arbitration briefs. *See* ER, pp. 303-348 (Arbitration Briefs). Furthermore, it is clear that the arbitrators considered both HIPAA and the continuing clause in the Agreement in rendering their award. The two-paragraph arbitration award explicitly referenced both HIPAA and the "continuing clause." *See* ER, p. 393 (Arbitration Award, October 1, 2003). There is nothing in the record which would suggest that the arbitrators ignored HIPAA or the continuing clause; rather, they were addressed in the award. Without deciding the issue, the most that can be concluded is that the arbitrators erred in interpreting or applying the law. This type of error or misapplication of the law does not amount to a manifest disregard of the law. *See Luong*, 368 F.3d at 1112 (indicating that the arbitrator considered a case (*Toyota)* relevant to the issues, and finding that "without expressing a view one way or the other on whether the arbitrator got *Toyota* right, it is clear that the arbitrator did not *ignore* it. His written decision is part of the petition. Virtually every line of the opinion and award discusses *Toyota* and how it plays out on the facts in Luong's case. That cannot amount to 'manifest disregard of federal law.'").

[50] In determining whether an arbitrator manifestly disregarded the law, "[t]he reviewing court should not concern itself with the 'correctness' of an arbitration award. Where the parties have agreed to arbitration, the courts will not review the merits of the dispute." *Thompson v. Tega-Rand Intern.*, 740 F.2d 762, 763 (9th Cir. 1984). Here, the arbitrators clearly interpreted the contract and considered relevant law. Accordingly, we find that the lower court erred in vacating the arbitrators' award on the ground that the arbitrators manifestly disregarded the law.

b. Essence of the Parties' Agreement

[51] In vacating the arbitrators' October 1, 2003 award, the lower court also held that the award violated the "essence" of the parties' Agreement. The court concluded:

> The essence of the agreement between the parties is its continuity and the method it has provided to promote continuity. The very essence of the agreement mandates and demands continuity. When an arbitration award grants termination of the agreement without exploring and deciding the dispute which lead the parties to impasse (disagreement as to benefits and rates), the arbitration award goes against the very essence of the agreement.

ER, vol. II of II, p. 425 (Decision and Order, October 20, 2003, p. 25).

[52] Courts have adopted the essence ground, holding that "[a]n arbitration award may be overturned if it does not 'draw its essence' from the contract." *Michigan Mut. Ins. Co. v. Unigard Sec. Ins. Co.*, 44 F.3d 826, 830-31 (9th Cir. 1995) (quoting *Local Joint Exec. Bd. of Las Vegas v. Riverboat Casino, Inc.*, 817 F.2d 524, 527 (9th Cir.1987)). As discussed below, we find that the essence ground does not support vacating the arbitrators' award in this case; thus, we leave open the question of whether the essence test is a proper ground for vacating an award. "[W]e are not presented with the proper justification necessitating our adoption and use of" the essence test. *Sumitomo Constr. Co.*, 1997 Guam 8 at ¶ 20.

[53] Courts adopting the essence test have found that in determining whether an arbitration award drew its essence from the contract, the focus is on whether "the arbitrator looked to the words of the contract and to the conduct of the parties." *Michigan Mut.*, 44 F.3d at 831. An award draws its essence from the agreement "so long as the interpretation can in some rational manner be derived from the agreement, 'viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award.'" *Amoco Oil Co. v. Oil, Chemical and Atomic Workers Int'l Union, Local 7-1, Inc.*, 548 F.2d 1288, 1294 (7th Cir. 1977) (quoting *Ludwig Honold Manufacturing Co. v. Fletcher*, 405 F.2d 1123, 1128 (3d Cir. 1969)); *see also Executone Info. Sys., Inc.*, 26 F.3d at 1320 ("[W]e must affirm the arbitrator's decision if it is *rationally inferable* from the letter or the purpose of the underlying agreement."). Basically, an award fails to draw its essence from the agreement if it can be said that "the award ignored the plain language of the contract." *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 986-87 (9th Cir. 2001).

[54] Furthermore, "[t]he Supreme Court has instructed that 'as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.'" *Jenkins v. Prudential-Bache Sec., Inc.*, 847 F.2d 631, 635 (10th Cir.1988) (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38, 108 S. Ct. 364, 370-71 (1987)). A court should not disturb "an arbitrator's decision unless it can be said with positive assurance that the contract is not susceptible to the arbitrator's interpretation." *Id.* at 635.

[55] The question here is whether the arbitrators construed the parties' Agreement, and whether the Agreement was at all susceptible to the arbitrators' interpretation - namely, that PacifiCare may be relieved of further obligations under the Agreement. Under the plain language of the Agreement, PacifiCare was required to renew the contract. Paragraph 2.1 of the Agreement provided that the contract "shall renew automatically for one year each October 1st unless terminated for major default in availability or quality of services". ER, p. 172, vol. II of II (Agreement, ¶ 2.1). The parties were further required to come to some agreement as to rates and benefits, and that a dispute as to the rates for FY 2004 should be submitted, and therefore decided, by way of arbitration. ER, vol. II of II, pp. 173, 180-81 (Agreement ¶¶ 3.1, 5.1) (setting forth the timeline for negotiating rates); Supplemental Record on Appeal, (Decl. of David A. Mair, Ex. A) (stating that the parties shall submit disputes which were negotiated and not agreed upon to arbitration). Notwithstanding these provisions in the Agreement, we cannot conclude with "positive assurance" that the arbitrators' conclusion to terminate coverage was not "rationally inferable" from the contract. The precise remedy for determining rates where the parties could not agree on rates was not articulated *explicitly* under the Agreement. The terms of the Agreement did not clearly provide that should an impasse be reached as to rates, rates shall be determined by an arbitrator. Such silence on the issue could have led to an inference that should the parties disagree as to rates, and the Government did not wish to accept the rates proposed by PacifiCare after an earnest attempt by the parties to come to an agreement (as was the case here), PacifiCare was not bound to provide continued coverage.[10] Under this

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[10] This conclusion arguably finds support viewing the Agreement in light of the statutes relied upon by the arbitrators, specifically, HIPAA and local law. The Agreement was silent on the remedy for a disagreement as to rates. Furthermore, neither HIPAA nor

interpretation, the arbitrators' decision, while perhaps a misinterpretation of the contract, was not necessarily a complete departure from the essence of the contract. *See Jenkins*, 847 F.2d at 635 ("The arbitrator may not ignore the

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local law offers a remedy in such circumstance. In fact, HIPAA does not address the issue of rates. *See* William F. Highberger, *Material on Health Care Law*, in American Law Institute-American Bar Association Continuing Legal Education, July 23, 1998, Current Developments in Employment Law, *available at* WESTLAW, SD06 ALI-ABA 395, 409 ("HIPAA does not set premium rates but it does prohibit plans and insuers from charging an individual more than similarly situated individuals in the same plan because of health status."); PAUL J. ROUTH, WELFARE BENEITS GUIDE § 3:18, *available at* WESTLAW, WELFAREBG § 3:18 (2004) ("[HIPAA] does not limit the premiums that the insurer can charge the group"); *see also* Greta E. Cowart, *The Never Ending Story*, in American Law Institute-American Bar Association Continuing Legal Education, July 7-11, 2003, Advanced Law of Pensions, Welfare Plans and Deferred Compensation, *available at* WESTLAW, SJ013 ALI-ABA 663, 675 (stating that HIPAA does not "place any limits on the amount an individual may be charged for an individual health insurance policy and an issuer may collect medical information to use it only for determining premiums").

The guaranteed renewal provision in HIPAA is subject to agreement for coverage by the *plan sponsor*, in this case, the Government. *See* 42 U.S.C. § 300gg-12(a) (West, WESTLAW through P.L. 108-295). Under HIPAA, the issuer is only required to renew at the option of the plan sponsor. One plausible conclusion under the facts of this case was that where the health care issuer (PacifiCare) proposes terms for renewal, which is rejected by the sponsor (the Government), then the sponsor has *de facto* rejected the offer and thereby opted against renewal of the coverage. In such circumstance, HIPAA allows for nonrenewal. Such conclusion arguably has some rational basis considering that local law and the parties' Agreement appear to be silent on the remedy to be applied where there is a disagreement as to rates. *See* JEFFREY D. MAMORSKY, HEALTH CARE BENEFITS LAW § 16.03 (2004), found at WESTLAW, HCBL, § 16.03 ("It is up to the states to regulate rates in order to make health coverage affordable. So where price is still a barrier to health coverage, the states will have to provide relief."); Routh, *supra*, § 3:18 ("[E]ven though the insurer is required to accept the small employer, the cost of the coverage can be prohibitively high, at least under [HIPAA]. The real issue is how state law will factor into the equation.").

plain language of the contract, but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract.").

[56] [T]he question for decision by a [ ] court asked to set aside an arbitration award . . . is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract. If they did, their interpretation is conclusive.

Hill, 814 F.2d at 1195 (citations omitted). In the present case, the arbitrators interpreted the parties' Agreement, and their decision was rationally based on the terms of Agreement. Assuming *arguendo* that the essence test was adopted as an appropriate ground for vacating an arbitration award in this jurisdiction, we could not conclude that the award in this case was made contrary to the essence of the parties' Agreement. Accordingly, we hold that the lower court erred in vacating the arbitrators' award on this ground.[11]

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[11] PacifiCare raises several other grounds supporting the arbitrators' award, including the following: (1) the Government breached its contract by unilaterally demanding coverage, violating the procurement law, and unilaterally determining rates and benefits; (2) renewal for FY 2004 was not required because the Government failed to timely pay premiums; (3) the Government cannot compel specific performance of the Agreement; (4) and enforcement of the Agreement is not allowed under the doctrine of "impossibility." These issues have been rendered mot by our holding reversing the lower court's decision has rendered. We therefore find it unnecessary to address these arguments.

IV.

[57] In accordance with the foregoing, we hold that the lower court erred in vacating the arbitrators' October 1, 2003 award. While the lower court was permitted to review whether the arbitrators exceeded their authority, the court was required to give the appropriate deference to the decisions of the arbitrators relating to procedural requirements for issuing the award. The lower court erred in undertaking an independent review of these matters and in concluding that the arbitrators exceeded their authority by addressing the issue of PacifiCare's obligation to continue coverage for FY 2004. Furthermore, the lower court's conclusion that the arbitrators erred as a matter of law on the merits did not support a finding that the arbitration award was made in manifest disregard of the law or contrary to the essence of the parties' Agreement. Accordingly, the lower court's decision vacating the October 1, 2003 arbitration award is hereby **REVERSED**. This matter is remanded for further proceedings consistent with this opinion.

TORRES, J., Dissenting:

[58] The majority holds that the arbitrators had the authority to determine the issue of PacifiCare's continued obligation to provide coverage under the Agreement for FY 2004. I disagree with this holding for the reasons set forth below, and I therefore respectfully dissent.

[59] The lower court in this case determined that the arbitrators exceeded their authority in ruling on the issue of PacifiCare's continued obligation to provide coverage for FY 2004. The court's decision was based on its finding that the arbitrators were not authorized to rule on issues which the

parties did not reach an impasse. The majority's analysis of the lower court's decision focuses on the lower court's determination on the issue of impasse. Specifically, the majority holds that the question of whether the parties reached an impasse on the issue of termination of coverage was a matter for the arbitrators to decide. I agree that the FAA applies to the present dispute, and that principles of interpretation governing cases under the FAA apply here. *Kanazawa, Ltd. v. Sound, Unlimited*, 440 F.2d 1239, 1240 (9th Cir. 1971); *see* 9 U.S.C. § 1 (West, WESTLAW through P.L. 108-295). I also agree that under the applicable law, procedural questions, including whether the parties reached an impasse on a particular issue, are matters for the arbitrators to decide. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557, 84 S. Ct. 909, 918 (1964). However, as the majority correctly recognizes, arbitrators are only permitted to decide procedural matters related to subjects which are arbitrable in the first place. *Id.* Thus, the issue of whether procedural requirements for arbitration have been met cannot be determined by the arbitrators unless it is first determined that "that the parties are obligated to submit the subject matter of a dispute to arbitration." *Id.*

[60] In the present case, the arbitrators' implicit finding that an impasse existed on the issue of termination is immaterial if the question of whether PacifiCare had a continuing obligation to provide coverage when the parties failed to mutually agree on the rates and benefits for FY 2004 was not a subject that the arbitrators had the authority to decide. It is here that my view diverges from that of the majority.

[61] It is settled law that the question of whether a dispute is arbitrable is for the court to decide absent "clear and unmistakable" evidence that the parties intended to reserve the question for the arbitrators. *First Options of Chicago,*

Inc. v. Kaplan, 514 U.S. 938, 944, 115 S. Ct. 1920, 1924 (1995) (quoting *AT&T Techs., Inc. v. Comm. Workers*, 475 U.S. 643, 649, 106 S. Ct. 1415, 1418-19) (brackets omitted); *see Lebanon Chem. Corp. v. United Farmers Plant Food, Inc.*, 179 F.3d 1095, 1100 (8th Cir. 1999) ("Without a clear and unmistakable delegation of the question of arbitrability to an arbitrator, the arbitrability of a dispute must be decided by the courts."). Viewing the parties' Agreement, and specifically the arbitration clause, it is neither clear nor unmistakable that the parties intended for the arbitrators to determine their own authority to decide a particular dispute. *See Carson v. Giant Food, Inc.*, 175 F.3d 325, 330 (4th Cir. 1999) ("[A]rbitration clauses that generally commit all interpretive disputes 'relating to' or 'arising out of' the agreement do not satisfy the clear and unmistakable test."); *McLaughlin Gormley King Co. v. Terminix Int'l Co.*, 105 F.3d 1192, 1194 (8th Cir. 1997) (finding that the contract provision requiring arbitration of "[a]ny controversy arising out of, or relating to this Agreement or any modification or extension hereof" did not "clearly and unmistakably evidence[ ] the parties' intent to give the arbitrator power to determine arbitrability") (alteration in original); *cf. Spahr v. Secco*, 330 F.3d 1266, 1270 (10th Cir. 2003) ("[P]rovisions to arbitrate all disputes arising out of or relating to the overall contract, like the one at issue here, do not provide the requisite clear and unmistakable evidence 'within the four corners of the [a]greement that the parties intended to submit the question of whether an agreement to arbitrate exists to an arbitrator.'") (quoting *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 780 (10th Cir. 1998)).

[62] Whether the parties intended to arbitrate the issue of termination when they could not mutually agree on rates and benefits was therefore a question for the court to decide. *See First Options*, 514 U.S. at 944-45, 115 S. Ct. at 1924. Deciding this question is a matter of contract interpretation.

See id., 514 U.S. at 944, 115 S. Ct. at 1924. In light of the policy favoring arbitration, doubts as to whether a particular issue is arbitrable are to be resolved in favor of arbitration. *See First Options*, 514 U.S. at 943-44, 115 S. Ct. at 1924. However, this policy favoring arbitration cannot override the parties' intent. *See Equal Employment Opportunity Comm'n ("E.E.O.C.") v. Waffle House, Inc.*, 534 U.S. 279, 294, 122 S. Ct. 754, 764 (2002) ("While ambiguities in the language of the agreement should be resolved in favor of arbitration, we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated.") (citing *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 476, 109 S. Ct. 1248, 103 L.Ed.2d 488 (1989)); *Carson*, 175 F.3d at 328-29. The United States Supreme Court has recognized that:

> [T]he FAA does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement. It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.

Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 478, 109 S. Ct. 1248, 1255 (1989) (citations omitted). "[T]he purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* 388 U.S. 395, 404 n.12, 87 S. Ct. 1801, 1806 n.12 (1967). Therefore, "[d]espite the public benefits of arbitration, the determination of what disputes are arbitrable is focused on the intent of the parties." *Carson*, 175 F.3d at 328-29; *see also U.S. Titan, Inc. v. Guangzhou Zhen Hua*

Shipping Co., 241 F.3d 135, 146 (2d Cir. 2001) ("Notwithstanding the strong federal policy favoring arbitration as an alternative means of dispute resolution, courts must treat agreements to arbitrate like any other contract.") (citation omitted). Because arbitration is a matter of contract, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Carson*, 175 F.3d at 328 (quoting *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347, (1960)) (brackets omitted).

63] Balancing the policy favoring arbitration with the [importance of contractual intent, arbitration should be allowed where the arbitration clause is broad without limitations and is properly denied when the parties have contracted to limit the scope of arbitration. Where an arbitration clause is not broad, courts must be sure that the parties contracted to arbitrate the issue at hand. "[A]lthough the Federal Arbitration Act embodies a clear federal policy favoring arbitration agreements, such agreements must not be so broadly construed as to encompass claims that were not intended to be arbitrated under the original contract." *AGCO Corp. v. Anglin*, 216 F.3d 589, 593 (7th Cir. 2000) (citation omitted). After reviewing the parties' Agreement, it is my view that the parties did not intend to arbitrate the issue of termination where the parties could not mutually agree on rates and benefits for FY 2004.

[64] "When deciding whether the parties agreed to arbitrate a certain matter . . . , courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944, 115 S. Ct. at 1924. Guam law provides that, in construing a written contract, the contract language is used to determine the parties' intent. Title 18 GCA § 87105 (1994) ("When a contract is reduced to writing, the intention of the parties is

to be ascertained from the writing alone, if possible . . . ."); *see Ronquillo v. Korea Auto, Fire & Marine Ins. Co.*, 2001 Guam 25, ¶ 10 (stating that "the intent of the parties is ascertained from the writing alone"); Title 18 GCA § 87104 (1994) ("The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."); *Camacho v. Camacho*, 1997 Guam 5, ¶ 33 ("[I]n interpreting a clause of a contract to determine the intent of the contracting parties, whenever possible, the express language of the contract should control.").

[65] Here, the arbitrators decided whether PacifiCare could be released from their continuing obligation to provide coverage where the parties did not agree on rates and benefits for FY 2004. PacifiCare argues, and the majority accepts, that the decision releasing PacifiCare from their continuing obligation is appropriate because it stems from a dispute or controversy covered by the arbitration clause. The Government's claim is essentially that it did not contract to arbitrate this grievance -- the release of PacifiCare from their continuing obligation, simply because PacifiCare made an offer that was not accepted. Instead, the parties agreed that the contract would be renewed automatically and PacifiCare had a continuing obligation to provide coverage with the rates to be determined by the arbitrators in the event of an impasse.

[66] In discerning the parties' intent on whether the issue of PacifiCare's continued obligation based on a failure to agree on rates and benefits was within the authority of the arbitrators to decide, the starting point is the language of the arbitration clause. Section 1.01 of Attachment III of the Agreement provide "*Any dispute or controversy* between the parties arising under this Agreement shall be submitted to binding arbitration." ER, vol. II of II, p. 215 (Agreement,

Attachment III, § 1.01). While general, the arbitration clause cannot be viewed in a vacuum, and must be considered against other provisions of the contract. *See Yasuda Fire & Marine Ins. Co. v. Weights Enters.*, 1998 Guam 5, ¶ 14 ("Language in a contract must be construed in the context of that instrument as a whole and the circumstances of that case . . . .") (quoting *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1265 9Cal. 1992)). "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." Title 18 GCA § 87114 (1994). Thus, we should not read a contract more expansively than what the parties intended, as gleaned from all provisions of the contract. It is the law in this jurisdiction the "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Title 18 GCA § 87107 (1994).

[67] Applying the aforementioned rules of interpretation, I conclude that the arbitration clause in this case cannot be characterized as "broad" in light of other provisions in the parties' Agreement which limit the subject matters and scope of the arbitrators' authority.

[68] Sections 1.01.11 and 1.01.24 of Attachment III of the Agreement specifically limit the issues that the arbitrators may rule upon after a dispute has been submitted for their consideration. Section 1.01.11 of Attachment III of the Agreement instructs that the arbitrators' decision must be limited to issues specified in the notice provided in Section 1.01. Similarly, Section 1.01.24 states that, while each party agrees to perform and to fulfill the award or finding concerning the matters submitted to arbitration, the arbitrators are bound by the Agreement. Both sections clearly indicate that the arbitrators cannot rule on "any dispute or controversy" arising under the Agreement as the

arbitration clause would initially suggest. Other provisions of the Agreement further evidence the parties' intent that not all issues will be covered by the arbitration clause. Section 1.01.24 provides that pleadings in any action pending on the same matter submitted to arbitration "shall be deemed amended to limit the issues, if any, to those *not* covered by the arbitration."[12] ER, vol. II of II, p. 220 (Agreement, Attachment III, § 1.01.24) (emphasis added). This section contemplates the existence of issues which are in fact cognizable in a court action and not arbitration. A final limitation is found in Section 2 of Attachment III of the Agreement, where the "parties acknowledge that the revisions to the arbitration procedures . . . do not change the effect of the decision of the District Court of Guam Appellate Division in Civil Case No. 90-00014A on the Agreement."[13] ER, vol. II of II, p. 220 (Agreement,

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[12] The majority suggest that this case does not come within the scope this particular part of Section 1.01.24, when in fact litigation was pending concerning the dispute of PacifiCare's obligation to continue coverage for FY 2004. This appeal arose out of a complaint filed by the Government to compel performance of the automatic renewal provision contained in the Agreement, thus triggering application of Section 1.01.24

[13] The Appellate Division case referred to is *Government of Guam v. FHP, Inc.*, Civ. No. 90-00014A, 1991 WL 275584 (D. Guam App. Div. July 10, 1991). There, the Government challenged the automatic renewal provision, similar to Paragraph 2.1 in this case, in a contract between the Government and PacifiCare's predecessor in interest, FHP, Inc. *Id.* At * 7. The Government alleged that the "automatic annual renewal clauses are effectively perpetual and thus void." *Id.* The Government further alleged that "because the contracts do not state a duration of the automatic annual renewal clauses, the health care service agreements are terminable by GovGuam after a reasonable time." *Id.* The Appellate Division disagreed, approving the lower court's finding that the agreement is "not expressly or impliedly perpetual," but rather, was "automatically renewed subject to written consent." *Id.* The court concluded that "[w]hile the agreements may therefore exist or a very long time, they may e terminated and thus are

Attachment III, § 2). Construing the arbitration clause as broad and unlimited would render these latter two contractual provisions superfluous. To give the latter provisions appropriate significance, they are only rationally interpreted as limiting the scope of the matters which may be resolved by way of arbitration.

[69] Because the arbitration clause is limited by other contract provisions, it is not at all clear that the parties intended to arbitrate termination after negotiations fail. If the arbitration clause were in fact broad and unlimited, it could more easily be concluded that any issue related to continued coverage is arbitrable to the extent that the issue arose out of the Agreement and the parties' obligations under the Agreement. However, because the arbitration clause in this Agreement is limited as identified above, it cannot be concluded that the clause necessarily encompasses *any* dispute as to PacifiCare's obligation to continue coverage. Thus, in discerning the intent of the parties, other provisions of the Agreement must be considered.

[70] Paragraph 2 of the Agreement clearly provides that the contract shall renew automatically on the first day of the Fiscal Year unless terminated by the Government for major default in the availability or quality of services. Importantly, the Agreement is silent on termination based on an allegation that PacifiCare's offer of rates was not accepted by the Government although the Agreement clearly contemplates termination of PacifiCare's obligation to continue coverage under other specified circumstances.[14]

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not in perpetuity." *Id.* The court ultimately determined that the "automatic annual renewal clause are valid and enforceable." *Id.* At * 11.

[71] Considering these aspects of the Agreement, it can only be concluded that the parties did not intend that the issue of PacifiCare's obligation to continue coverage based on failed negotiations was in fact arbitrable.[15] Because the parties clearly meant for coverage to be renewed automatically, it is evident that they intended for the arbitrators to decide only those questions related to aspects of coverage specified under the terms of the Agreement, and not the obligation to offer continued coverage under circumstances not contemplated under the Agreement. By including specific circumstances where termination is allowed, (e.g. for major default in the quality of services or the lack of an appropriation), the arbitrators' authority to decide questions of termination was limited. Such limitation influences the outcome here. Because termination for a failure to negotiate rates was not a circumstance warranting termination under the Agreement, it is apparent that the parties did not intend for this issue to be decided by the arbitrators. To hold otherwise eviscerates the parties' contractual obligations and is in contravention of the Agreement's continuing clause.

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[14] Under Paragraph 2.3, the contract may also be terminated in the event of non-payment due to a failure to appropriate funds. Further, Paragraph 2.2 reserves for PacifiCare the right to suspend performance or terminate membership in the event of nonpayment by subscribers.

[15] Notably, the Agreement is also silent on termination based on a material breach for nonpayment of premiums. PacifiCare asserts that the habitual late payment by the Government is a material breach of the contract and it is well settled law that a material breach excuses the other parties' performance. Section 1.01.11 of Attachment III specifically states that the arbitration award shall be based solely on the issues identified in the notice of issues provided in Section 1.01 of Attachment III. Whether the parties agreed that the arbitrators could decide this issue need not be addressed here because the issue of non-payment was not included in PacifiCare's notice provided in Section 1.01.

[72] This interpretation of the Agreement does not conflict with any recognized policy. Unlike in labor cases, for example, where it is agreed that the arbitrator has specialized knowledge which promotes the use of arbitration as a matter of policy, the arbitration scheme in the present case does not reflect the presence of specialized institutional competence which is more apt in administering the parties' rights under the contract. *See Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 377-379, 94 S. Ct. 629, 637 (1974).[16]

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[16] In *Gateway Coal Co. v. United Mineworkers of America*, the United States Supreme Court enunciated the standard in determining whether an issue is arbitrable under a collective-bargaining agreement, stating that "'[a]n order to arbitrate the particular grievance should not e denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" *Id.*, 414 U.S. 368, at 378-79, 94 S. Ct. at 632 (quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582—583, 80 S. Ct. 1347, 1353 (1960). The Court further recognized the basis for this liberal standard, stating that

> commercial arbitration and labor arbitration have different objectives. In the former case, arbitration takes the place of litigation, while in the latter "arbitration is the substitute for industrial strife." A collective-bargaining agreement cannot define every minute aspect of the complex and continuing relationship between the parties. Arbitration provides a method for resolving the unforeseen disagreements that inevitably arise. And in resolving such disputes, the labor arbitrator necessarily and appropriately has resort to considerations foreign to the courts:
>
> > The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in

There is nothing that would suggest that the arbitrators have any specialized knowledge which the parties would reasonably expect be accorded special reliance. So, too, there is nothing which would suggest that the parties would expect any different standard to apply in determining whether a particular claim is arbitrable. Thus, like the question of who should decide questions of arbitrability, where the intent of the parties to arbitrate questions of arbitrability must be clear and unmistakable, there is little reason to apply a lesser standard of proof in determining whether the parties agreed that a particular subject matter should be arbitrated. Both inquiries require the same fundamental determination -- that of the parties' intent. The majority seems to suggest that a lesser standard of proof is required to determine whether a particular claim is arbitrable. This manner of interpretation is debatable, for even a pro-arbitration interpretation of the contract cannot override the parties' intent as evidenced in the Agreement.[17]

> his knowledge of the common law of the shop and their trust in his personal judgment to ring to bear considerations which are not expressed in the contract as criteria for judgment.

Id. (quoting *United Steelworkers*, 363 U.S. at 578, 581-82, 80 S.Ct. at 1351-53).

[17] It is particularly appropriate that the court closely scrutinize the parties' intent under the Agreement regarding the scope of the arbitrators' authority to determine issues. This is because the Agreement appears to give one party the unilateral ability to frame the issues presented for arbitration. While it is clear that the notice provided in Section 1.01 cannot alter the contract or the arbitrators' authority under the contract, by allowing one party the ability to specify the issues, an opportunity exists to mingle non-arbitrable issues with arbitrable ones. The availability of this opportunity necessitates a more searching review of whether the issues actually submitted or ruled upon were within the

[73] A judge may vacate an arbitration award if the "arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4) (West, WESTLAW through P.L. 108-295). "An arbitrator exceeds his powers when he acts without subject matter jurisdiction, [or] decides an issue that was not submitted to arbitration . . . ." *Jordan v. Cal. Dep't of Motor Vehicles*, 123 Cal. Rptr. 2d 122, 131 (Ct. App. 2002) (citations omitted). The parties' Agreement in this case must be viewed as a whole, with each provision interpreted in light of each other, so as to give effect to every part, if reasonably practicable. *See* 18 GCA § 87107. When the intent is clear, the court must give effect to that intent.[18] Interpreting the parties' Agreement, it is clear that the Government bargained for the contract to continue each year and did not intend to arbitrate the question of PacifiCare's continued obligation to offer coverage where the parties could not simply agree on rates. Thus, the arbitrators ignored the Agreement's clear contractual limitations regarding their authority. The arbitrators acted on a subject which they had no authority to decide. "Arbitration under the [FAA] is a matter of consent, not coercion . . . ." *Volt Info. Sciences, Inc.*, 489 U.S. at 479, 109 S. Ct. at 1256. To uphold the arbitration award in this case would disregard the principle that "[t]he parties--not the

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arbitrators' authority to decide as evidenced under the Agreement – for it is the Agreement which encompasses the intent of *both* parties.

[18] Even if it is concluded that the question of the arbitrability of PacifiCare's obligation to continue coverage was ambiguous under the terms of the Agreement, such ambiguity must be resolved, as a matter of law, against PacifiCare. Section 87120 of Title 18 of the GCA states that where uncertainty is not removed by the general methods of statutory interpretation, "the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." Title 18 GCA § 87120 (1992). Furthermore, "[t]he promisor is presumed to be such party; except in a contract between a public officer or body, as such, and a private party, *in which it is presumed that all uncertainty was caused by private party*." *Id.* (emphasis added). Applying this rule of construction, an interpretation favoring the Government must prevail.

courts--control which disputes will be arbitrated." *Carson*, 175 F.3d at 329. For this reason, I respectfully dissent.

IN THE SUPERIOR COURT OF GUAM

GOVERNMENT OF GUAM And EDNA T. PAULINO,	Supreme Court Case No. CVA04-006
Plaintiff-Appellee,	Superior Court Case No. CV1426-03
vs.	
PACIFICARE HEALTH INSURANCE COMPANY OF MICRONESIA, INC., dba PACIFICARE ASIA PACIFIC,	**ORDER**
Defendant-Appellant.	

This matter comes before the court pursuant to a Petition for Rehearing filed by the Plaintiff-Appellee, the Government of Guam ("Government") on October 1, 2004. The Government requests rehearing of the court's Opinion filed on September 17, 2004, pursuant to Rule 31 of the Guam Rules of Appellate Procedure. The Defendant-Appellant PacifiCare Health Insurance Co. of Micronesia, Inc., dba PacifiCare Asia Pacific ("PacifiCare") filed a response in opposition to the Petition on October 21, 2004.

Under Rule 31 of the Rules of Appellate Procedure, rehearing may only be granted where the court has overlooked or misapprehended points of law or fact in its original consideration of the appeal. *See* Guam R.App.Pro. 31; *Guam Housing & Urban Renewal Authority vs. Dongbu Ins. Co.*, 2002 Guam 3, ¶¶ 1, 5.

In its Petition, the Government makes two primary contentions supporting reconsideration of the majority decision in its September 17, 2004 Opinion. First, the Government argues that the court erroneously determined that because the issues relevant to the arbitrators' authority were procedural in nature and therefore within the purview of the arbitrators to decide, the arbitrators properly considered the issue of termination. With regard to this argument, the Government contends that the record does not support a finding that the parties had reached an impasse on the issue of Pacificare's obligation to continue coverage under the parties' Agreement. Second, the Government contends that in light of the Appellate Division decision in *Government of Guam v. FHP, Inc.*, Civ. Nos. 90-00014A, 90-000206A, 90-00040A, 1991 WL 275584 (D. Guam App. Div. July 10, 1991), this court erred in reversing the trial court's decision vacating the arbitration award. With regard to this argument, the Government contends that under the *Government of Guam v. FHP* case, the arbitrators lacked the authority to arbitrate the issue of termination where the parties could not agree on rates and benefits.

Having considered the arguments presented in the Petition, the court does not agree that rehearing is necessary. The arguments raised in the Petition were either previously considered and rejected by the majority of the court as set forth in the majority opinion. The Government had failed to demonstrate that the court misapprehended or overlooked points of law or fact in its decision. *See Brown v. Eastman Kodak Co.*, Supreme Ct. Case No. CVA99-010 (Order, May 8, 2001). Accordingly, the Government's Petition for

Rehearing is **DENIED** and the mandate shall herein issue forthwith.

SO ORDERED, this 8th day of November, 2004.

PETER C. SIGUENZA, JR.
Justice Pro Tempore

ROBERT J. TORRES, JR.
Associate Justice

F. PHILIP CARBULLIDO
Chief Justice

IN THE SUPERIOR COURT OF GUAM

GOVERNMENT OF GUAM and EDNA T. PAULINO,	)	CIVIL CASE NO. CV1426-03
Plaintiffs/*Kehante siha,*	)	
v.	)	*DISISION YAN OTDEN*[1]
PACIFICARE HEALTH INSURANCE COMPANY OF MICRONESIA, INC. dba PACIFICARE ASIA PACIFIC,	)	
Defendant/*Difendante.*	)	

The Court heard Defendant's Motion to Confirm and Enforce the October 1, 2003 Arbitration Award, to Issue Judgment, and to Vacate the Court's Temporary Restraining Order on October 16, 2003, in addition to Plaintiff's Motion to Vacate the same Arbitration Award. **Eric A. Heisel,** Esq., Assistant Attorney General, Solicitors Division and **Douglas B. Moylan**, Esq., the Attorney General of Guam, represented the Plaintiffs, the *Government of Guam and Edna T. Paulino.* **Randall Todd Thompson,** Esq. and **David A. Mair,** Esq., of Mair, Mair, Spade & Thompson, P.C., represented the Defendant, *PacifiCare Health Insurance Company of Micronesia, Inc. dba PacifiCare Asia Pacific.* The Court, having listened attentively to the arguments presented by the parties, took decision of the motions under advisement. After having given much thought, consideration, and deliberation to the parties' arguments,

[1] Decision and Order

their memoranda of law, the exhibits entered into evidence as well as the pleadings herein, the Court now renders this Decision and Order.

I MANMALOFFAN[2]

On September 17, 2003, the **GOVERNMENT OF GUAM** (hereinafter referred to as GovGuam) filed a complaint and simultaneously sought ex parte Injunctive Relief against **PACIFICARE HEALTH INSURANCE COMPANY OF MICRONESIA, INC. dba PACIFICARE ASIA PACIFIC** (hereinafter referred to as PacifiCare). Therein, GovGuam sought a restraining order to prevent PacifiCare from terminating any medical or dental coverage to GovGuam employees and retirees after September 30, 2003, pending an arbitration proceeding between the parties. GovGuam's ex parte application was heard on September 18, 2003. Defendant PacifiCare appeared and opposed the restraining order. The Court continued the hearing to September 19[3], at which time, it issued an order which restrained PacifiCare from terminating any medical or dental coverage to GovGuam employees and retirees until further order of the Court. Thereafter the parties proceeded to arbitration. On October 1, a three-member arbitration panel issued its unanimous decision and relieved PacifiCare from any further obligation to provide medical or dental coverage to GovGuam employees and retirees. PacifiCare has filed the present motion which seeks to confirm the award, vacate this Court's restraining order and enter judgment in accordance with the arbitration award. GovGuam, on the other hand, has filed a motion which seeks to set aside the arbitration award. In furtherance of this

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[2] Background

[3] It appeared at the said hearing that the parties could settle the issue between themselves, so the Court continued the ex parte application to the next day.

endeavor, it has amended its complaint and has brought in as an additional complainant (Edna T. Paulino) who argues that the arbitration proceeding was a denial of her rights under Guam's Consumer Protection laws. The Court heard the parties' oral arguments on October 17, 2003. Having listened attentively, the Court took the motions under advisement at the conclusion of the said hearing.

DINISKUTA[4]

Since 1973, GovGuam and PacifiCare have entered into an Agreement which has allowed them to enter into yearly renewal contractual relationships whereby PacifiCare would provide medical and dental coverage for employees and retirees of GovGuam based upon rates agreed upon by both parties. When this agreement began in 1973, PacifiCare was then known as "FHP". It has been thirty (30) years since PacifiCare and GovGuam have worked under a basic agreement, an agreement where their relationship persists pursuant to a "continuing clause" therein. For the most part, the parties have agreed upon benefits and rates. But, despite the "continuing clause" in their agreement, the parties have had disputes with the meaning of the said clause in the past. Their dispute has taken the parties before arbitration and ultimately to the courts. PacifiCare, then known as FHP, and other health providers have taken GovGuam to Court in a series of cases to enforce the terms of the basic agreement. In their initial dispute, GovGuam took the position that the "continuing clause" was invalid and sought termination of the health insurance agreements. The Superior Court, however, determined the "continuing clause" to be valid and binding upon the government. This determination by the Superior Court was affirmed b the Appellate Division of the District Court of Guam, then the appellate body for hearing

[4] Discussion

appeals from the Superior Court. Thus, under the Court's holding in this series of cases, GovGuam could not terminate the agreement against PacifiCare or against ay other health provider, unless specifically authorized and provided for under the basic agreement. Thus, GovGuam has been required to work with PacifiCare in agreeing upon medical and dental coverage and their rates for the past years. It is against this background that the present controversy has developed.

During the current fiscal year [on July 25, 2003 and continuing for a period in excess of six (6) days[5]], PacifiCare and GovGuam entered into negotiations for new medical and dental coverage (benefits) and their rates for the next fiscal year, to commence October 1, 2003. The parties, however, were not able to reach agreement regarding medical coverage, although an agreement was reached regarding dental coverage. On August 26, 2003, PacifiCare sent a letter to GovGuam, demanding arbitration of their dispute which lead to their impasse. PacifiCare asked that the arbitration consider the following issue relative to its dispute with the Government of Guam:

> 1. PacifiCare maintains that the Agreement does not permit Defendant to proceed with open enrollment for Fiscal Year 2004 by permitting government of Guam employees and retirees to select PacifiCare at Fiscal Year 2003 rates and benefits.
>
> 2. **PacifiCare maintains that under federal law and the Agreement, it is merely required to offer renewal of coverage for Fiscal Year 2004 at rates and**

[5] See letter of August 26, 2003, from PacifiCare to Government of Guam Re Notice of Impasse and Demand for Arbitration.

benefits that PacifiCare deems appropriate. PacifiCare further maintains that it has fulfilled this obligation by making several offers of renewal and that PacifiCare's last offer has been expressly rejected by Defendant. **As a consequence, PacifiCare has no further obligation to provide any medical or dental coverage for Government of Guam employees and retirees for fiscal Year 2004**; or

3. In the alternative, if PacifiCare is required to provide any medical or dental coverage to Government of Guam for Fiscal year 2004, and PacifiCare does not have the right under federal law or the Agreement to determine the appropriate rates and benefits, then PacifiCare maintains that such rates and benefits must be decided by mutual agreement or binding arbitration; or

4. In the alternative, if PacifiCare is required to provide any medical or dental services to Government of Guam for fiscal Year 2004, and the rates and benefits are different than those provided in Fiscal Year 2003, then PacifiCare maintains that the new rates and benefits for fiscal year 2004 should be effective as of October 1, 2003.

Subsequent to its arbitration demand letter to GovGuam, PacifiCare published notices in the Pacific Daily News on September 3, 4, and 5, 2003, advising all government employees and retirees that it would not offer any medical or dental insurance coverage to GovGuam employees and retirees after September 30, 2003. Based

upon these notices, Plaintiff, the government of Guam filed a complaint on September 17, 2003 and sought a restraining order preventing PacifiCare from terminating coverage of GovGuam employees and retirees pending the arbitration. This Court agreed with Plaintiff and ordered PacifiCare not to terminate coverage [because there was a pending arbitration proceeding] until further order of the Court. The parties proceeded to arbitration on September 30 and on October 1, 2003, the three-member arbitration[6] panel unanimously announced its award. The decision stated:

> Pursuant to 1.01.21 of the Arbitration Agreement, the Award is hereby rendered.
>
> 1. PacifiCare made offers for renewal of medical coverage for fiscal year 2004 at rates and benefits that PacifiCare deemed appropriate. The Government of Guam did not accept said offers. Under the provisions of the Health Insurance Portability and Accountability Act, 42 USC 300 gg-12(a), PacifiCare met it[s] obligations and is under no further obligation to negotiate or to provide any medical health insurance plan to the Government of Guam for fiscal year 2004.
>
> 2. Pacificare is also relieved of any obligation to renew its contract with the Government under the "continuing clause" in its Agreement with the Government of Guam. *Government of Guam vs. FHP, Inc., et al.*, Civ. Nos. CV0809-89, CV0755-89, CV1200-89 and CV1250-89 (Super.Ct. Guam), on

[6] Under the arbitration agreement, PacifiCare and GovGuam each appointed an arbitrator and the two arbitrators selected a third member.

appeal as Civ. Nos. 90-00014A, 90-0002[6]A, 90-00040A (D. Guam App. Div. 1991).

Defendant Pacificare has now moved to confirm the award, vacate the temporary restraining order and enter judgment in accordance with the award. Plaintiff Government of Guam has now moved to set aside and vacate the arbitration award.

I. STANDARD OF REVIEW

The Supreme Court of Guam has set the appropriate standard which must be employed by this Court in determining whether to confirm or set aside arbitration awards. In *Sumitomo Construction Co., Ltd. v. Zhong Ye, Inc.*, 1997 Guam 8, the High Court stated:

> The legislature modeled Guam's arbitration statutes after the United States Arbitration Act. Generally, when a legislature adopts a statute which is identical or similar to one in effect in another jurisdiction, it is presumed that the adopting jurisdiction applies the construction placed on the statute by the originating jurisdiction....
>
> We can properly assume that the legislature meant to adopt the federal construction of Guam's arbitration states when it patterned those provisions after the United States Arbitration Act.....we believe that use of federal interpretations would give proper effect to the legislature's objectives.
>
> When reviewing the decision of a lower court confirming an arbitration award, questions of

law are reviewed de novo while questions of fact are reviewed under the clearly erroneous standard.... These same standards apply to the trial court's review of the arbitrator's award.....

In arbitration cases decided under the federal act, the scope of review is quite narrow. This is complementary to a policy favoring consensual agreements and guaranteeing enforcement of contractual terms between the parties. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* 473 U.S. 614 (1985). Although a serious question may arise as to the arbitrator's view of the law, an award "will not be set aside by a court for error either in law or fact ... if the award contains the honest decision of the arbitrators, after a full and fair hearing of the parties." *Coast Trading Co., Inc. v. Pacific Molasses Co.,* 681 F.2d 1195, 1198 (9th Cir. 1982) (citations omitted). In other words, "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, a court's conviction that the arbitrator made a serious mistake or committed grievous error will not furnish a satisfactory basis for undoing the decision." *Advest, Inc. v. McCarthy,* 914 F.2d 6, 9 (1st Cir. 1990) (citations omitted). With these standards in mind, we now address Guam's arbitration laws.

Arbitration awards are binding unless certain limited exceptions exist upon which a court may vacate the grant. Specifically, upon

application of a party, a court may vacate the award under the following circumstances:

> 1. Where the award was procured by corruption, fraud, or undue means.
>
> 2. Where there was evident partially or corruption in the arbitrators, or either of them.
>
> 3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> 4. Where the arbitrators exceeded their powers, or so imperfectly executed them so that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> 7 GCA § 42108(a)-(d).

In *Sumitomo,* the Supreme Court of Guam, while recognizing the judicial doctrine formulated b the courts as a basis for setting aside an arbitration award, left open the question whether it would adopt "manifest disregard of the law" as an appropriate circumstances for vacating and setting aside an arbitration award.

II. RELEVANT GUAM LAW/CONTRACTUAL PROVISIONS

A. GUAM LAW

4 GCA §4301. Group Insurance.

(a) The Governor is authorized to enter contracts and reject proposals, with the written concurrence of the Speaker of the Guam Legislature or the Presiding Judge of the Superior Court of Guam whose consents may be withheld in their sole discretion, with one (1) or more insurance companies, authorized to do business in Guam, for group insurance, including, but not limited to hospitalization, medical care, life and accident, for all employees or separate groups of employees of the government of Guam.....

(b) All participation by employees in such contracts of insurance shall be on a voluntary basis. Effective in the next contract following the enactment of this subparagraph, the government's contribution for health and dental insurance shall be uniform within each class (including separate classes and rates for retired employees and their survivors) for all competing plans and shall not be less than fifty percent (50%) of the lowest premium for a single employee, except that the government shall increase the contributions it makes on behalf of a retired employee or survivor of a retired employee so that the retired employee or the survivor of a retired employee contributes no more than an active employee who is otherwise in the same class.

.....

(f) Any insurance company or health maintenance organization offering group health coverage under this section may at its sole option, offer two (2) plans with different premiums and/or benefits, only one of which plans may offer a rebate, with all members of both plans being in the same risk pool. The plan offering the rebate or refund

shall base the same on the claims made by the plan members under the plan.

(g) The Governor of Guam shall incorporate the **continuing provisions clause** made available to Guam Memorial Health Plan, FHP, Inc. and Staywell, which was the subject of the District Court of Guam Appellate Division Case Government of Guam v. FHP, Inc., (D. Guam App.Div. 1991), in the government's group health insurance agreement with any health insurance company, or its assignees or successors, which has contracted with the government of Guam for at least two (2) consecutive years. This Subsection shall be retroactive to include any insurance companies falling within said classification for the past five (5) years from the date of enactment of this Subsection, regardless of whether they currently have a group health insurance contract with the government of Guam, and shall entitle the group health insurance company to immediately enter into a contract with the government with said continuing provision included. In the event that the government had already negotiated the terms of a contract with a group health insurance company qualifying herein, but not executed the contract, said contract shall be offered to the insurance company with the continuing provision incorporated.

B. CONTRACTUAL PROVISIONS

2.1 Term. This contract, in its original form, because effective August 1, 1973. It shall renew automatically for one year each October 1st unless terminated for major default in availability or quality of services, given by written notice from the Government of Guam to PacifiCare not less than ninety (90) calendar days before the renewal date, or unless modified by mutual agreement. Time is the essence of the covenants of this paragraph.

3.1 Rates. PacifiCare guarantees the rates set forth in Attachments 1-A and 1-B.

5.1 Schedule of Renegotiations and Open Enrollment. The following will be used in annual rate and benefit negotiations. PacifiCare and GovGuam will make best efforts to adhere to this schedule. Time is of the essence to the covenants in this paragraph.

5.1.1. May 15. Contractor submits new rate and benefit proposals and supporting data……

5.1.2. August 1. Best efforts will be made to agree upon rates with all Health Insuring Organizations.

8.14. PacifiCare guarantees the negotiated rates shall remain in effect for the negotiated benefits for the contact year.

C. ARBITRATION PROCEDURE

1.01 Any dispute or controversy between the parties arising under this Agreement shall be submitted to binding arbitration. Arbitration is initiated and required by giving notice specifying the issues to be arbitrated.

……..

Section 2. The parties acknowledge that the revisions to the arbitration procedures made herein do not change the effect of the decision of the District Court of Guam Appellate Division in Civil Case No. 90-00014A on the agreement. In addition, Chapter 32 of Title 5 of the Guam Code Annotated, more commonly referred to as the "Deceptive Trade Practices-Consumer Protection Act", states at Section 32104(c) that an agreement to arbitrate constitutes an important waiver of the right of access to the courts which must be expressly waived in writing. In consideration of this amendment to the Agreement, the Government of Guam

agrees that the arbitration procedure herein shall be a part of the Agreement each year that the Agreement renews. The Government of Guam does hereby expressly waive any application of the provisions of Section 32104(c) of the Deceptive Trade Practices-Consumer Protection Act to the Arbitration Procedures of the Agreement, as now amended, or as amended in the future. The signatures of the parties' attorneys below confirm that both parties were represented by legal counsel in the procuring of this agreement to amend the Agreement.

III. DEFENDANT'S MOTION TO CONFIRM AND VACATE ORDER

On October 3, 2003, Defendant PacifiCare moved this Court to confirm the arbitration award, vacate its restraining order, and enter judgment in accordance with the arbitration award. PacifiCare sets forth the following principles in support of its motion, which briefly may be summarized as follows:.

A. THE FAA AND GUAM LAW FAVORS CONFIRMATION

In this regard, PacifiCare reminds the Court that Section 1.01.24 of the Arbitration Agreement provides that the parties are bound by the arbitration award. It is PacifiCare's contention that Guam precedent (*GG vs. FHP*, 1991 WL 275584, *Sumitomo vs. Zhong Ye*, 1997 Guam 8, 1997 WL 471506, and a recent 9th Circuit Ct. Case – *Kyocera vs. Prudential*,.. support confirmation of the award. PacifiCare also reminds the Court that a high deference is given decisions of arbitration awards.

B. THE ARBITRATORS DID NOT EXCEED THEIR AUTHORITY

Pacificare points out that in its demand for arbitration, it specifically asked the arbitrators to make a ruling on the "continuance clause", i.e., whether **PacifiCare had any further obligation to provide any medical or dental coverage for Government of Guam employees and retirees for fiscal Year 2004.** It argues that even if this demand were ambiguous, the Arbitrators did not exceed the scope of their charge under *Sumitomo*, supra, and *Brown vs. Dillingham Const. Co.*, 2003 Guam 2. PacifiCare further cites the Court to a myriad of federal cases which all stand for the proposition that arbitrators do not exceed their charge by reaching matters not covered under arbitration demand.

C. COURT SHOULD VACATE ORDER IN LIGHT OF ARBITRATION AWARD

It is PacifiCare's request that this Court should vacate its order requiring PacifiCare to continue to provide medical and dental coverage to Government of Guam employees and retirees in light of the Arbitrators' decision that PacifiCare has not further obligation to GovGuam under its "continuing clause" Agreement once GovGuam rejected PacifiCare's offers for medical coverage.

IV. PLAINTIFF'S MOTION TO VACATE ARBITRATION AWARD

On October 6, 2003, Plaintiff GovGuam amended its complaint and an additional Plaintiff was added, namely, Edna T. Paulino, a Government of Guam employee who currently has medical coverage under PacifiCare's health plan. With Paulino as an additional Plaintiff, GovGuam moved this Court to vacate and set aside the Arbitration Award. GovGuam sets forth the following principles in support of its motion, which can briefly be summarized as follows:

A. An arbitration award can be vacated on grounds that the panel exceeded its powers.

GovGuam cites 7 GCA §42108(d) which authorizes a court to vacate an award where "the arbitrators exceeded their powers or so imperfectly executed them" so that a mutual, final and definite award on the matter submitted was not made. Plaintiffs refer to *Allen v. Interstate Exchange of Automobile Club of Southern California,* 80 Cal. Rptr. 247, (1969) and *Sumitomo,* with regard to the proper standard of review.

B. The Arbitrators exceeded their authority because the arbitration clause was unenforceable.

GovGuam argues that 5 GCA §32104(c) of the Consumer Protection Act, as interpreted in *Deluna v. GMHP,* CV96-0025A (April 23, 1998 D. Ct. App.Div.), invalidates the arbitration clause contained in the Agreement between the parties. The *Deluna* case involved a suit by the named plaintiff against GMHP to enforce the medical provisions of his wife's employer group health insurance plan after his wife incurred medical expenses and died from injuries received in an automobile accident. In *Deluna,* this Court dismissed Plaintiff's complaint (without prejudice to the proceedings in arbitration) for failure to state a claim, holding that *Deluna* was not a consumer with regard to GMHP. This Court further held that it would be unreasonable and practically impossible to have every employee of an employer negotiating health benefits to bring a lawyer to review and cosign every benefit plan containing an arbitration clause. This Court then remanded the matter to arbitration.

On appeal, the District Court Appellate Division held that Deluna was indeed a consumer under the Consumer Protection Act even though the contract under which he was a beneficiary was negotiated between the employer and the health insurance provider. More importantly, the Appellate Division held that 5 GCA §32104(c) of the Consumer Protection Act made the binding arbitration provision of GMHP's agreement unenforceable against the claim presented by Deluna.

The Court observes that in order for GovGuam to raise the issue, it was necessary to amend its complaint and bring into the current litigation a complainant, who would have parity with Deluna, i.e., a third party beneficiary under a contract for health insurance executed between the consumer's employer and a health provider, namely, Edna T. Paulino.

Plaintiffs assert that Paulino has the right to have her dispute as stated in the amended complaint heard before the Superior Court and not before arbitration.

C. The Arbitrators failed to execute their duty to resolve the rate dispute.

GovGuam contends that the Arbitrators did not arbitrate rates as required to under the Agreement but rather referred to federal law for support in finding Pacificare was no longer bound under the Agreement. Plaintiff contends that under *GovGuam vs. FHP*, rate disputes are submitted to arbitration. Instead of resolving this dispute, the arbitrators terminated the contract. GovGuam further contends that the impasse which occurred resulted from the parties' inability to agree on rates and benefits. Arbitration could have determined this dispute.

D. Arbitrators exceeded their authority in allowing PacifiCare to terminate the agreement.

Plaintiffs contend that the arbitrators' authority is limited to those provisions that appear in the contract. It is the government's contention that as a matter of general principle of law, arbitrators decided disputes arising out of the contract, not the contract's every existence. Plaintiffs point out that the contract provides no basis for termination of the Agreement by PacifiCare; that the arbitrators exceeded their authority in allowing PacifiCare to terminate the contract. Thus GovGuam essentially argues that the issue regarding termination is not an arbitrable issue.

In support of their contention, Plaintiffs cite the Court to the series of Superior Court cases in which GovGuam argued the lack of enforce ability of the continuing clause provision in FHP and GMHP's contracts. The three Superior Court cases all hold the "continuing clause" provision to be valid and binding upon the government and could not be a basis for termination by the government should an impasse develop on medical and dental benefits and rates.

E. Arbitration does not apply to issue whether offers have been accepted.

Paragraph (b) of PacifiCare's demand for arbitration provides that it would merely be required "to offer renewal of coverage for Fiscal Year 2004 at rates and benefits that PacifiCare deems appropriate". GovGuam argues that as a condition precedent to arbitration, PacifiCare must have offered a renewal of coverage for Fiscal Year 2004. GovGuam submits that PacifiCare never complied with this condition precedent because it withdrew Option A (the plan responsive to GovGuam's Invitation to Bid) on the first day of negotiations before GovGuam could accept the said plan.

F. The Arbitrators exceeded their authority in allowing PacifiCare to terminate its services immediately.

GovGuam argues that its PacifiCare agreement [in light of its continuation clause], if terminated, should be terminated only within a reasonable time and not at will. If PacifiCare is allowed to terminate the contract, it should be required to provide insurance coverage for at least 180 days prior to discontinuance of coverage. See 42 U.S.C. §300gg-12(c)(2). The arbitrators exceeded their authority because they allowed PacifiCare to discontinue services immediately rather than allowing a reasonable time for termination.

HEARING ON MOTIONS

At the hearing on the motions, the parties appeared and reinforced their respective positions. The parties presented further opposition arguments to the other's motion in addition to the opposition contained in their briefs. In total, the parties presented their oral arguments for approximately three hours.

During oral arguments, PacifiCare advised the Court that the company was losing approximately $400,000.00 per month if required to continue providing medical coverage at existing Fiscal Year 2003 rates, a factor to be considered in assessing PacifiCare's continued ability to remain a viable entity.

GovGuam, on the other hand, pointed out that PacifiCare has benefited throughout the years of its relationship with GovGuam. All GovGuam was asking was that medical benefits and rates be established through arbitration[7]. Moreover, the government contends that the

[7] It is GovGuam's position that the Court should establish benefits and rates if it set aside the arbitration award. If, however, the

arbitration panel never made a finding that PacifiCare's continued participation as a health insurance issuer with GovGuam was economically impossible.

In determining the outcome in this matter, the Court must be mindful that the Supreme Court has determined that the Court's review of an arbitration award is limited and quite narrow. As to the law, it is de novo, but as to questions of fact, it is under the clearly erroneous standard. Although a court may have serious questions about the arbitrators' view of the law, an award will not be set aside even if decided erroneously if the award contains the honest decision of the arbitrators. As long as the arbitrators are construing and applying the contract and acting within the scope of their authority, a court's conviction that the arbitrators made a serious mistake or committed a grievous error will not suffice.

The Court must confirm the arbitration award, unless GovGuam presents a legally justifiable basis for vacating the award. GovGuam, thus, bears the burden in this regard. Therefore, the Court must primarily address GovGuam's motion.

Effect of the Consumer Protection Act and the *Deluna* case

GovGuam has argued that its arbitration clause with PacifiCare has been rendered unenforceable by 5 GCA §32104(c) of the Consumer Protection Act and the *Deluna* case. In *Deluna,* the Appellate Division held that Deluna [a third party beneficiary under a contract for health services between Deluna's wife's employer and the health insurance provider] was a consumer of services with regards to the

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Court was hesitant in doing so, then the benefits and rates issue should be determined through arbitration.

health insurance provider. As a consumer, Deluna was not bound by the arbitration provision between employer and the health insurance provider, unless each party (Deluna and GMHP) was represented by an attorney and the arbitration agreement was signed by the attorneys representing each party.

When this Court, then sitting as the trial court, decided Deluna, it determined that Deluna's employer, Big Eye Helicopter, was the consumer referenced under the Consumer Protection Act rather than Deluna because it was the employer who negotiated the contract on behalf of its employees. This Court also found the group coverage plan was provided to the employer, Big Eye Helicopter, and not Deluna.

In this controversy, it is the Government of Guam and not Paulino which sought a resolution of its benefits and rates dispute with Pacificare. It is the Government of Guam and not Paulino which entered into and participated in the arbitration proceedings. It is the Government of Guam and not Paulino which has an agreement with Pacificare which provides for medical and dental coverage and which, among others, contains a "continuing clause".

In *Deluna*, the issue was whether GMHP's arbitration clause was enforceable against Deluna, a beneficiary of her employer's group with GMHP. With regard to the setting aside of the present arbitration award, the issue is whether PacifiCare's arbitration agreement is enforceable against the Government of Guam. Applying 5 GCA §32104(c) of the Consumer Protection Act, the Court finds that it is enforceable. Both parties were represented by attorneys when the agreement was signed and the agreement was also signed by the attorneys for the parties. Paulino has no standing to challenge the present arbitration award as she

was a party to it nor does she have an arbitrable claim with regards to the setting of benefits and rates between PacifiCare and GovGuam. Thus, the Court finds that the Consumer Protection Act and the *Deluna* case do not support GovGuam's claim that its dispute with PacifiCare may not be submitted to arbitration.

The Arbitrators exceeded their authority.

GovGuam argues that the arbitrators exceeded their powers because it exceeded their powers because it addressed the issue of termination which was not an issue in which impasse had been reached in negotiations. Prior to the negotiations, the parties executed GovGuam's Enclosure 9A, the Government of Guam Administrative Procedures for the Negotiations for FY 2004 Employee Health Plan Contracts, Arbitration Exhibit 14. Section A required the parties to enter good faith negotiations. Section 1 contained provisions regarding impasse. It provided:

> 1. If the teams cannot reach agreement on a particular issue, that issue shall be set aside, if at all possible, and the negotiations proceed with. Such issue may be revisited at a later stage at the negotiations.
>
> 2. An impasse on a particular issue shall only be declared after all other issues have been discussed. Further, an impasse on a particular issue shall be declared after both teams have presented oral arguments and fully considered the arguments of the other team, and both teams have stated that they are unwilling to make further compromises.

3. Neither team shall request arbitration until both teams have agreed that an impasse exists, or until good faith negotiations have been held for at least six days and agreement on a particular issue has been exhaustively pursued.

4. **A request for arbitration shall be confined to those issues to which resolutions was earnestly sought at the negotiating table but was not reached.**

GovGuam asserts that the only matters which it negotiated with PacifiCare were medical and dental rates and benefits. Unilateral termination by PacifiCare was not an issue that was negotiated. The arbitrators exceeded their power when they allowed PacifiCare to terminate the contract.

In addition to the above, GovGuam contends that the issue whether PacifiCare could unilaterally terminate a contract is not an issue "that arose under the contract". Thus, it is not a type of dispute which comes within the meaning of Section 1.01 of the arbitration agreement. GovGuam contends that only disputes regarding rates and benefits, disputes whether the parties negotiated in good faith or when rates and benefits become effective are the types of disputes that may arise under the agreement. In this regard, GovGuam contends that termination is not an arbitrable issue.

The arbitrators manifestly disregarded the law.

GovGuam also argues that the arbitration award should be set aside because the arbitrators **manifestly disregarded the law.** In Sumitomo, the Supreme Court

recognized that Courts may vacate an arbitration award for manifest disregard of the law. The Court stated:

> Arbitration awards have been vacated based on a "manifest disregard of the law." *Todd Shipyards Corp. v. Cunard Line Ltd.*, 943 F.2d 1056 (9th Cir. 1991). This exception is not statutory but rather a judicially recognized federal exception introduced by the United States Supreme Court in *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), *overruled on other grounds by Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). The Second Circuit has described the exception in the following manner:
>
> > Although the bounds of this ground have never been defined, it clearly means more than error or misunderstanding with respect to the law. (citations omitted). The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it. ...Judicial inquiry under the "manifest disregard" standard is therefore extremely limited. The governing law alleged to have

> been ignored by the arbitrators must be well defined, explicit, and clearly applicable.
>
> *Carte Blanche v. Carte Blanche,* 888 F.2d 260, 265 (2nd Cir. 1989) (citations omitted).

It is GovGuam's contention that the arbitrators manifestly disregarded the express provisions in the contract regarding termination. GovGuam can terminate under Section 2.1 of the contract for major default in the availability or quality of services provided by PacifiCare. Section 2.3 provides for termination due to a lack of appropriations from the Guam Legislature. Section 2.2 authorizes PacifiCare to suspend their performance or terminate membership with respect to any member whose premium has not been paid. But most important, **GovGuam contends that Section 2.1 also requires an automatic continuation of the contract.** GovGuam argues that it is clear on the fact of the agreement [and is capable of being readily and instantly perceived by the arbitrators] that PacifiCare could not terminate the agreement if the parties were unable to agree on benefits and rates.

GovGuam also argues that the arbitrators manifestly disregarded the law when they decided that PacifiCare could terminate the agreement pursuant to 42 U.S.C. §300gg-12(a) when GovGuam rejected its offers to renew, this result, when the statute referenced mandates the opposite. It is argued that the referenced federal statute requires a health insurance issuer (PacifiCare) to renew or continue in force health insurance coverage at the option of the plan sponsor (GovGuam). The provision of the statute cited by the arbitrators contain no express provision that allows PacifiCare to do what the arbitrators have allowed it do.

GovGuam also argues that the arbitrators disregarded the rulings in the Superior Court and the Appellate Division of the District Court cases. The arbitrators cite CV0755-89, CV0808-89, CV1200-89, CV1250-89 (the Superior Court cases), and District Court case Nos. 90-00014A, 90-00026A, and 90-00040A in support of their conclusion that the renewal clause does not prevent PacifiCare from unilaterally terminating the contract. GovGuam emphatically states that these cases say the opposite. These cases uphold the validity of the continuation clause.

The remedy of unilateral termination fails to meet the "essence test."

In *Steelworkers v. Enterprise Corp.*, 363 U.S. 593, the U.S. Supreme Court formulated the "essence test". Under the essence test, an arbitrator is confined to the interpretation and application of the contract that contains the arbitration clause. The arbitration award must draw its essence from the contract.

Did the Arbitrators exceed their authority? Did they manifestly disregard the law? Did they fail to meet the essence test? The Plaintiffs say hat they did while the Defendant says that they did not. It appears that the underlying reason for Plaintiffs contention that the arbitrators did exceed their authority, disregard the law and fail to meet the essence test emanates from the arbitrators' alleged erroneous legal conclusion reached by the arbitrators is not a ground for vacating an award. Indeed, in *Tatibouet v. Ellsworth*, 54 P. 3d 397, (Hawaii) 2002, the Hawaii Supreme Court emphatically pointed out that an error in the law in a decision reached by the arbitrators is not a basis for setting aside the award. The Supreme Court did point out, however, that an arbitrator's award is valid when it draws its essence from the arbitration agreement. Vacatur of an arbitration

award is not a proper remedy for arbitrators' imperfect understanding of law. The concurring opinion did point out that:

> Concurring Opinion of ACOBA, J., with whom RAMIL, J., Joins.
> I agree that arbitrators may be held to have exceeded their powers if they go beyond the boundaries of the arbitration agreement—a matter we discern from the language of the arbitration agreement itself. *See Wayland Lum Constr., Inc. v. Kaneshige,* 90 Hawaii 417, 422, 978 P.2d 855, 860 (1999) ("The scope of an arbitrator's authority is determined by the agreement." (Citing *Clawson v. Habilitat, Inc.*, 71 Haw. 76, 78, 783 P.2d 1230, 1231 (1989); *Mathewson v. Aloha Airlines, Inc.*, 82 Hawaii 57, 75, 919 P.2d 969, 987 (1996).)).
> Since the "Governing Law" provision controlled the construction of the Agreement and the mandatory arbitration clause was part of that agreement, *see id.* ("[A]n arbitration agreement should be construed as a whole, and its meaning determined from the entire context." (Citations omitted.)), arguably the arbitrators were bound to construe the agreement in accordance with the governing law specified in the governing law provision, *see, e.g.Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 64, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995) (stating that a general choice of law provision in an agreement accompanied b a separate arbitration clause should be read to incorporate into the agreement the "substantive principles that [the

state court] would apply, but not...special rules limiting the authority of arbitrators" when the arbitration came within the Federal Arbitration Act); *Osteen v. T.E. Cuttino Constr. Co.*, 315 S.C. 422, 434 S.E.2d 281, 284 (1993) (holding that the governing law provision of a contract, although separate from the arbitration agreement clause, "indicates the parties' agreement to have the validity and construction of the contract determined by arbitrators according to the substantive law").

However, assuming that that is the case, any error in the application of Hawaii law by the arbitrators would be beyond our purview. See *Mathewson*, 82 Hawaii at 70, 919 P.2d at 982 ("An arbitration award, if made in good faith, is conclusive upon the parties, and ...neither of them can be permitted to prove that the arbitrators decided wrong either as to the law or the facts of the case.'" (Quoting *Board of Directors of Ass'n of Apartment Owners of Tropicana Manor v. Jeffers*, 73 Haw. 201, 214, 830 P.2d 503, 511 (1992) (citations omitted).)). It is not evident from the facts that the arbitrators expressly chose to disregard Hawaii law, so as to constitute" misbehavior[,]" Hawaii Revised Statutes (HRS) §658-9(3) (1993), or to indicate that the arbitrators "so imperfectly executed [their powers], that a mutual, final, and definite award, upon the subject matter submitted, was not made[,]" HRS §658-9(4). For the foregoing reasons, I concur in the result.

Hawai'i, 2002.

Tatibouet v. Ellsworth

In ultimately reaching its decision herein, the Court must not concern itself whether the arbitrators would have reached the same conclusion based upon those factors made in oral arguments to the Court during the hearing of the motions; i.e., whether PacifiCare should be forced to continue in a business enterprise with the government when it is loosing $400,000.00 per month in providing medical coverage based upon fiscal year 2003 rates or whether the effect o the death spiral analysis is such that no rate given to PacifiCare can allow it to remain a viable business entity within Guam's business community. The Court is very sensitive to these concerns of PacifiCare and notes that PacifiCare is not a non-profit business like its predecessors was, but is now a profit making corporation. As a profit making corporation, it must be allowed to make a profit to continue its economic viability within Guam's community. PacifiCare's continued viability is of great importance to the Court because of its major economic importance to Guam as it provides support for an economy especially at a time when such support is sorely needed. Most important, it provides a base for employees and retirees of the government of Guam [just like similarly situated individuals in the employ of the federal government and private employment] to receive medical and dental coverage. Medical coverage remains a necessary and essential item in the lives of individuals. Thus, PacifiCare's continued economic viability is of greatest concern and is essential to this community.

Despite the arguments above, the Court can only make its decision herein, not on what was not decided by the arbitrators [whether the result of their decision cold have been supported by the factors mentioned above or any other plausible factor], but only on what was decided. This is of critical importance. The arbitrators decided that:

> 1. PacifiCare made offers for renewal of medical coverage for fiscal year 2004 at rates and benefits that PacifiCare deemed appropriate. The Government of Guam did not accept said offers. Under the provisions of the Health Insurance Portability and Accountability Act, 42 USC300 gg-12(a), PacifiCare met it[s] obligations and is under no further obligation to negotiate or to provide any medical health insurance plan to the Government of Guam for fiscal year 2004.
>
> 2. PacifiCare is also relieved of any obligation to renew its contract with the Government under the "continuing clause" in its Agreement with the Government of Guam. Government of Guam vs. FHP, Inc., et al., Civ. Nos. CV0809-89, CV0755-89, CV1200-89 and CV1250-89 (Super. Ct. Guam), on appeal as Civ. Nos. 90-00014A, 90-0002[6]A, 90-00040A (D. Guam App. Div. 1991).

With regards to the above decision, the Arbitrators made only two findings of fact. They found that (1) PacifiCare made offers for renewal of medical coverage to the GovGuam and (2) GovGuam rejected those offers. Applying the standard of review under *Sumitomo,* these findings of fact cannot be said to be clearly erroneous, but rather states the correct nature of the events which lead to the impasse between the parties during the negotiations.

Having made the said findings, **the arbitrators made two conclusions of law.** They concluded that **(1)** PacifiCare met its obligations under the provisions of the Health Insurance Portability and Accountability Act, 42

USC300 gg-12(a), and was under no further obligation to negotiate or to provide any medical health insurance plan to the Government of Guam for fiscal year 2004, and **(2)** PacifiCare was also relieved of any obligation to renew its contract with the Government under the "continuing clause" in its Agreement with the Government of Guam, citing a series of cases which interpreted the continuing clause in the agreement, namely, Government of Guam vs. FHP, Inc., et al., Civ. Nos. CV0809-89, CV0755-89, CV1200-89 and CV1250-89 (Super. Ct. Guam), on appeal as Civ. Nos. 90-00014A, 90-0002[6]A, 90-00040A (D. Guam App. Div. 1991).

Conclusions of law are not findings of fact but involved questions of law. Under *Sumitomo*, questions of law are reviewed *de novo*. Thus, the arbitrators' legal conclusions are reviewed *de novo*. With regards to the arbitrators **first legal conclusion**, GovGuam argues that nothing in HIPPA authorizes the arbitrators to relieve PacifiCare from providing medical coverage to the government. The government points out that the opposite result is required because HIPPA requires the renewal of existing medical coverage at the option of the plan holder (GovGuam), rather than the termination of medical coverage. With regards to the arbitrators' **second legal conclusion**, GovGuam argues that the series of cases in the Superior Court of Guam and the Appellate Division of the District Court [referred to by the arbitration in relieving PacifiCare of any further obligation to renew its contract with GovGuam under its "continuing clause"] all hold that the "continuing clause" provision in the Agreement is valid and binding and the government could not terminate the agreement.

After reviewing the legal memoranda submitted herein, the Court finds that the arbitrators committed an error of law in their decision. The Court must then ask itself

whether this error of law simply is an honest error by the arbitrators in the application of federal, local, contract, or common law or does it represent a manifest disregard for the law. Moreover, the Court must ask itself whether the error in law drew its essence from the agreement between the parties and further, whether the arbitrators exceeded their authority in deciding to terminate the agreement when termination was not an issue of impasse between the parties[8].

ESSENCE OF THE AGREEMENT BETWEEN THE PACIFICARE AND GOVGUAM

A discussion of the essence of the agreement between the parties is significant is a determination of this matter. The Agreement between PacifiCare and GovGuam (a relationship that has been in existence since 1973) draws its essence on its ability to provide a continuing contractual relationship whereby PacifiCare would provide medical and dental benefits to the government of Guam and the government of Guam would subscribe to those benefits at rates agreed upon by the parties. The agreement contains a "continuing clause" which obliges the parties to meet prior o the expiration of a fiscal year to discuss and negotiate benefits and rates for the next fiscal year. The parties in their thirty (30) year relationship has generally agreed upon benefits and rates for the ensuring fiscal year. When there has been no agreement, that dispute has been submitted to arbitration. In the late 1980's when the parties were not able to reach agreement as to rates, the rates were set by arbitrators. The award was confirmed by the court and rates were made retroactive to the October 1 of the ensuing fiscal year.

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[8] The government raises a fundamental issue herein and that is whether termination is an arbitrable matter. The Court notes that questions whether an issue is arbitrable is within the proper cognizance of this court.

Thus, the Court finds that the essence of the Agreement between the parties is its continuity and the method it has provided to promote continuity. **The very essence of the agreement mandates and demands continuity. When an arbitration award grants termination of the agreement without exploring and deciding the dispute which lead the parties to impasse (disagreement as to benefits and rates), the arbitration award goes against the very essence of the agreement.** The award does not foster nor does it promote the essence of the agreement, its continuity. The award has judiciously removed the "continuing clause" from the reach of one party and relieved the other of its mandate.

MANIFEST DISREGARD OF THE LAW

Because the purpose of the mandate of continuity is so apparent in the agreement, it appears that the arbitrators manifestly disregarded contract and common law in its award. It is argued by PacifiCare that federal law (HIPPA) preempts state law and authorizes the arbitrators to terminate the contract when GovGuam rejected PacifiCare's medical coverage offers. As the government has pointed out, HIPPA provides no basis for the termination of health coverage because a health insurance issuer has made an offer which has been rejected. PacifiCare states that GovGuam was late in payments and the arbitrators could have terminated the agreement because of nonpayment of premiums under 42 U.S.C. §300gg-12(b)(1). There is no finding of fact, however, by the arbitrators that the government was in default. Assuming, however, that there was such authority under HIPPA, the Court notes HIPPA was enacted years after the agreement between PacifiCare and GovGuam and as a later enacted federal statute, it could not impair the

obligation of the contract as between the parties under constitutional law principles.

ACTNG IN EXCESS OF THEIR AUTHORITY

Court also finds the arbitrators' termination ruling to be of great significance. The arbitrators were bound to construe the agreement and all other agreements reached b the parties in relationship to their award. Enclosure 9A of the procedures for negotiations executed by both parties required the parties to bargain in good faith. It provided hat an impasse should only be declared after all issues had been discussed and the parties were unwilling to make further compromises. The arbitrators were bond by the following provision:

> **4. A request for arbitration shall be confined to those issues to which resolutions was earnestly sought at the negotiating table but was not reached.**

During negotiations, the parties **reached impasse solely on the medical coverage issue.** In this regard, the Court notes that the parties did not reach agreement on dental benefits and rates. Based upon Enclosure 9A, the arbitrators were bound to decide the only issue which resulted in an impasse, i.e., medical coverage.

Thus, the Court finds that the arbitration exceeded their authority when they concluded that PacifiCare was no longer required to provide medical and dental benefits to GovGuam and in the process of doing so, they relieved PacifiCare from any further obligation under its contract with the government of Guam. In further making this finding, the Court holds that the arbitrators' award must be limited to those issues which created an impasse and not

other issues. The Court comes to this conclusion because the arties never reached an impasse on dental benefits and rates, yet the arbitrators disregarded this agreement and made dental coverage a matter which came under the termination ruling. The Court further notes that an award terminating coverage of dental benefits and rates also goes against the essence of the contract (an agreement which fosters continuity), not because there was a lack of agreement but especially since the parties reached agreement as to benefits and rates. The arbitrators exceeded their authority because they terminated dental coverage when the parties had reach an agreement as to its benefits and rates. The mandate of the "continuing clause" requires its continuity, rather than its termination.

ASSESSING RELEVANT FINDINGS AND CONCLUSIONS

It is with the aforesaid findings and conclusions that direct this court to decide that it must vacate the arbitration award entered on October 1, 2003. The Court hereby sets aside the said award and remands the matter to the arbitrators to resolve the dispute between the parties, i.e., the extent of medical coverage and the corresponding rates that must be in order between the parties for Fiscal year 2004.

It is not the intent of the Court by this order to place PacifiCare in a situation where it would be face with heavy losses for doing business with the government of Guam by continuing to provide medical coverage to its employees and retirees. In remanding this matter to the arbitrators, all that the Court does is to give an opportunity to allow the dispute mechanism established in the parties' agreement to move forward so that this established mechanism can resolve the dispute between the parties. The parties came into dispute and reached impasse because they did not reach agreement

as to medial benefits and rates for Fiscal Year 2004. The parties' dispute regarding medical benefits and rates was never presented to the arbitrators for resolution.

In submitting this dispute to arbitration, the arbitrators may properly decide on the type of coverage [and the corresponding rate] which PacifiCare can feasibly offer to GovGuam to remain a viable business enterprise in the wake of its contractual relationship with the government of Guam.

The Court also notes that PacifiCare initially presented two types of medical coverage proposals to the government of Guam. Nothing in arbitration prevents PacifiCare from presenting the same proposals and asking the arbitrators for appropriate rates that it believes would allow the company to make a return of profit. By the same token, nothing in arbitration would prevent the government of Guam from asking that benefits include certain types of coverages or detailing reasons why rates should be a certain amount. The Court again reiterates that the purpose of its ruling is to allow a dispute which has reached impasse to move to a resolution stage (arbitration), the mechanism for dispute resolution under an agreement which fosters continuity. Proceeding to arbitration to determine medical benefits and rates is in furtherance of the continuation policy established by the "continuing clause" provision.

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[9] Conclusion

Based upon the reasons stated above, the Court finds that the arbitration award referenced herein did not draw its essence from the Agreement of the parties; that in relieving PacifiCare from any further obligations under its agreement with the government of Guam and terminating their contractual relationship, the arbitrators exceeded their authority and expressed manifest disregard for contract and common law. The Court therefore vacates[10] the arbitration award and remands the matter to the arbitrators to arbitrate appropriate medical benefits and rates between PacifiCare and GovGuam for Fiscal Year 2004. In remanding this matter to the arbitrators, the Court respectfully asks the arbitrators to commence and conclude their arbitration and announce their decision by October 28, 2003[11]. The matter will be set for further proceeding in this Court on October 30, 2003 at 2:00 p.m.

Este I sinneda I Kotte[12].

So Ordered this 20th day of October, 2003.

Joaquin V.E. Manibusan, Jr.
Judge, Superior Court of Guam

[10] As the Court had advised the parties during oral arguments, after eight years on the bench this day, this case has become the most difficult for the Court to decide. The Court has great respect for the arbitrators in this matter and further notes that its review of their decision is quite narrow.

[11] Subject however to time constraints as with regards to an appeal.

[12] These are the findings of the Court.

IN THE TERRITORY OF GUAM

ARBITRATION PROCEEDING

PACIFICARE HEALTH INSURANCE COMPANY OF MICRONESIA, INC. Dba PACIFICARE ASIA PACIFIC,	)	
Claimant,	)	**ARBITRATION AWARD**
vs.	)	
GOVERNMENT OF GUAM,	)	
Respondent.	)	

This matter was heard by the Arbitration Panel pursuant to the Agreement of the parties entitled: "Pacificare Asia Pacific Arbitration Procedure Government of Guam 2002-2003 Contract."

The hearing was held on September 30, 2003 and concluded on that date and submitted to the Arbitration Panel for its award.

Pursuant to 1.01.21 of the Arbitration Agreement, the Award is hereby rendered.

1. Pacificare made offers for renewal of medical coverage for fiscal year 2004 at rates and benefits that Pacificare deemed appropriate. The Government of Guam did not accept said

offers. Under the provisions of the Health Insurance Portability and Accountability Act, 42 USC300 gg-12(a). Pacificare met its obligations and is under no further obligation to negotiate or to provide any medical health insurance plan to the Government of Guam for fiscal year 2004.

2. Pacificare is also relieved of any obligation to renew its contract with the Government under the "continuing clause" in its Agreement with the Government of Guam, *Government of Guam v. FHP, Inc., et al.*, Civ. Nos. CV0809-89, CV0755-89, CV1200-89 and CV1250-89

Dated: October 1, 2003.

_____
ROBERT A. HEFNER
Arbitrator

_____
G.W.F. GUMATAOTAO
Arbitrator

_____
WILLIAM FITZGERALD
Arbitrator

IN THE SUPERIOR COURT OF GUAM

GOVERNMENT OF GUAM And EDNA T. PAULINO,	Supreme Court Case No. CVA04-006
Plaintiff-Appellee,	Superior Court Case No. CV1426-03
vs.	
PACIFICARE HEALTH INSURANCE COMPANY OF MICRONESIA, INC., dba PACIFICARE ASIA PACIFIC,	**MANDATE**
Defendant-Appellant.	

APPEAL from the Superior Court of Guam.

THIS CAUSE came before this court on July 16, 2004.

ON CONSIDERATION THEREOF, it is now hereby ordered and adjudged by this court on appeal from the Superior Court of Guam, that the lower court's decision vacating the October 1, 2003 arbitration award is **REVERSED**. This matter is remanded for further proceedings consistent with this opinion.

Dated this 8th day of November, 2004.

IN THE SUPREME COURT OF GUAM

GOVERNMENT OF GUAM and EDNA T. PAULINO,	)	Supreme Court Case No. CVA04-006
Plaintiffs-Appellees,	)	Superior Court Case No. CV1426-03
vs.	)	
PACIFICARE HEALTH INSURANCE COMPANY OF MICRONESIA, INC., dba PACIFICARE ASIA PACIFIC,	)	**NOTICE OF ENTRY ON DOCKET**
Defendant-Appellant.	)	

TO: David Mair
Ste. 801, PNB
238 Archbishop F.C. Flores St.
Hagåtña, GU 96910

Joseph Guthrie
Ste. 2-200E,
Guam Judicial Ctr.
120 W. O'Brien Dr.
Hagåtña, GU 96910

On November 8, 2004, the Mandate filed on November 8, 2004, was entered on the docket in the above-entitled matter.

Dated this 8th day of November, 2004.

SIRENA S. PEREZ
Clerk of Court

By: _____
Assistant Clerk of Court

DECLARATION OF MAILING

On the 8th day of November, 2004, I enclosed and sealed a copy of the NOTICE OF ENTRY ON DOCKET in an envelope addressed to the individuals in said notice. I caused the same envelopes with postage affixed to be placed in the U.S. Mail.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 8th day of November, 2004.

IMELDA B. DUENAS
Declarant

Supreme Court, U.S.
FILED
MAR 11 2005
OFFICE OF THE CLERK

No. 04-1074

In The
Supreme Court of the United States

GOVERNMENT OF GUAM
and EDNA T. PAULINO,

Petitioners,

v.

PACIFICARE HEALTH INSURANCE
COMPANY OF MICRONESIA, INC.
dba PACIFICARE ASIA PACIFIC,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Guam

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RANDALL TODD THOMPSON
MAIR, MAIR, SPADE & THOMPSON
A Professional Corporation
238 A.F.C. Flores Street
Suite 801 Pacific News Building
Hagåtña, Guam 96910
Telephone: (671) 472-2089

Counsel of Record for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Guam Supreme Court committed error in finding that the Federal Arbitration Act, 9 U.S.C. §1, *et seq.*, permits arbitration of disputes not expressly identified or listed in the agreement to arbitrate.

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OPINIONS BELOW

Respondent adopts and incorporates Petitioners' statement in this regard, with the following addition. Subsequent to its Arbitral Award (Pet. App. 1d), the arbitration panel, on October 30, 2003, issued its Arbitral Award on Remand from the Superior Court. Resp. App. 1a.

STATEMENT OF THE CASE

Respondent PacifiCare Health Insurance Company of Micronesia, Inc. ("PacifiCare") was one of several insurance companies that contracted to provide health insurance coverage for Government of Guam ("Government")[1] employees and retirees. It is undisputed that the subject contract, known as the "Group Health Insurance Agreement/Health Services Agreement" ("Agreement"), contained a "broad" arbitration clause. *See* Pet. 9. A dispute arose between the parties concerning rates and benefits for the coming fiscal year and whether the "Continuing Clause" in the Agreement required PacifiCare to renew the Agreement for another year. Pet. App. 1d-2d. This dispute was presented to the duly appointed three-member arbitration panel. On October 1, 2003, a unanimous panel held that pursuant to Guam law and the Health Insurance Portability and Accountability Act ("HIPAA"), PacifiCare was relieved of any obligation to renew. Pet. App. 1d-2d.

On October 20, 2003, the Superior Court of Guam granted the Government's motion to vacate the award on

[1] References to the "Petitioners" or the "Government" in this brief refer collectively to Petitioners Government of Guam and Edna T. Paulino.

the grounds that it "did not draw its essence from the Agreement of the parties" and that "the arbitrators exceeded their authority and expressed manifest disregard for contract and common law." Pet. App. 36c. The Order remanded the matter to the arbitrators to determine appropriate medical benefits and rates between PacifiCare and the Government for Fiscal Year 2004.

The arbitrators' October 30, 2003 "Arbitration Award on Remand from the Superior Court" ("Award on Remand") complied with the Court's instruction that the Arbitrators renew the Agreement and set rates and benefits. Resp. App. 3a. However, the arbitrators also reiterated that they believed their original October 1, 2003 Award was a correct resolution of the matter. In fact, the arbitrators stated that they were not confident that a suitable rate structure was feasible in view of an actuarial "death spiral" plaguing the Government's health insurance program. As the panel stated, "[t]he [Government's] health plan benefits and the composition of the users presents perhaps an insolvable situation." Resp. App. 4a. A key portion of the Award on Remand reads as follows:

> The testimony and exhibits presented to the Panel on September 30th demonstrated beyond doubt (and without any contradiction by [the Government]) that to require PacifiCare to continue to provide health care benefits and rates anywhere near those charged in Fiscal Year 2003, would impose substantial financial losses on PacifiCare. Although [the Government] disputed, to some extent, that PacifiCare was in a 'death spiral', this panel finds that at the Fiscal Year 2003 rates, this was and is the case.

> The Superior Court was clear in expressing its concern about having rates and benefits so that PacifiCare could continue to provide [the Government] employees and retirees and still make a profit.
>
> However, at the crux of this matter is a crucial problem. [The Government's] health plan benefits and the composition of the users presents perhaps an insolvable situation. Pursuant to Exhibit 79, it is known that the number of . . . retirees in the plan has continued to increase. As expected, this class of users need and demand more care and hence more funding for their care. The Government of Guam at the hearing of this matter acknowledged the inherent problem with the existing plan.

Resp. App. 4a.

On September 17, 2004, the Supreme Court of Guam reversed the Superior Court's vacatur of the Arbitral Award, rejecting all of the lower court's grounds for vacatur and concluding, *inter alia*, that "a dispute concerning whether PacifiCare could be released from its obligations was a subject matter that was arbitrable under the parties' Agreement." Opinion at ¶34, Pet. App. 26a. The court rejected the lower court's arbitrability ruling because it was grounded on the incorrect determination that the parties had not reached an impasse on the issue of termination, which the Guam high court held was a question for the arbitrators. *Id.* at ¶36, Pet. App. 27a, *citing John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964). The court's Opinion acknowledged that PacifiCare had also raised several additional grounds supporting the Arbitral Award, but found it "unnecessary

to address these arguments" in light of its holding. Opinion at ¶56, n. 11, Pet. App. 42a.

PacifiCare disagrees with Petitioners' Statement of the Case to the extent that it states or implies the sole basis advanced for termination of the subject Agreement was the mere failure to agree on rates for the upcoming term. In fact, as demonstrated by the Arbitral Award, the Award on Remand, and the Guam court decisions issued in this case, PacifiCare had sought termination on multiple alternative grounds, including the impracticability of setting effective rates, HIPAA, substantive provisions of Guam statutory law, and Guam case law which had earlier determined that health insurance agreements with the Government were terminable at will on the part of the health insurers.

Nevertheless, apart from the underlying merits, the parties unquestionably manifested an intention to submit disputes to an arbitration panel, and the finding of the Guam Supreme Court was a routine application of settled principles of law that does not raise any new, unique or novel issues for this Court to consider.

SUMMARY OF ARGUMENT

It is well settled that a broad arbitration clause (such as the one in this case) requires arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Tech., Inc. v. Communication Workers*, 475 U.S. 643, 650 (1986); *Steelworkers v. Warrior & Gulf Nav. Co*, 363 U.S. 574, 582-583 (1960). Reduced to its essence, the Government's Petition advocates the exact

opposite view – that no issue should be held arbitrable unless the agreement expressly enumerates the precise dispute in advance and states that it is arbitrable. Such a doctrine would constitute an abrupt retreat from over a half century of settled and consistent jurisprudence embodying a strong presumption in favor of arbitrability. Indeed, since the specific disputes that arise are generally not known in advance, the Government's position would largely render a prospective arbitration agreement an illusory and unenforceable promise. The Petition fails to show either that the Guam Supreme Court misstated the law or that this case is an appropriate vehicle for reexamining the law.

REASONS FOR DENYING THE PETITION

I.

THE GOVERNMENT HAS MISCHARACTERIZED BOTH THE CASE AND THE CONTROLLING LAW

A. Mischaracterization of the Case

Contrary to the Government's contentions, PacifiCare raised multiple grounds for terminating the Agreement both at the arbitration proceeding and before the Guam courts.[2] This is reflected in the October 1, 2003 Arbitral Award which, although brief, expressly referred to HIPAA and Guam case law germane to termination of Government health care agreements. Pet. App. 2d.

[2] The Guam Supreme Court acknowledged alternative grounds in its Opinion (Opinion at ¶56, n. 11, Pet. App. 42a), but found it "unnecessary to address these arguments" in light of its holding. *Id.*

Moreover, the October 30, 2003 Award on Remand manifested the arbitrators' concern over whether a suitable rate structure was even feasible. According to the arbitrators, the arbitration proceedings demonstrated "beyond doubt" the existence of an actuarial quagmire plaguing the Agreement at issue which the arbitrators dubbed "a crucial problem" and possibly "an insolvable situation." These facts are significant because, contrary to the Government's gloss on the matter, this was not an ordinary or routine situation in which parties simply failed to come to terms on rates.

The Government also neglected to mention that the "Arbitration Procedure" of the subject Agreement was expressly made subject to a decision of Guam's former Appellate Division court.[3] The case referred to in this provision of the Agreement is (unofficially) reported as *Government of Guam v. FHP, Inc.*, 1991 WL 275584 (D. Guam App. Div., Opinion, July 10, 1991) ("Appellate Division case"). That case had held, *inter alia*, that health insurers doing business with the Government, including PacifiCare's predecessor in interest, FHP, Inc., could terminate their agreements with the Government at the end of each term.[4]

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[3] Section 2 of the Arbitration Procedure reads as follows, in pertinent part: "The parties acknowledge that the revisions to the arbitration procedures made herein do not change the effect of the decision of the District Court of Guam Appellate Division in Civil Case No. 90-00014A on the Agreement."

[4] The Appellate Division had held that while the contracts were automatically renewable, they were subject to written consent. *Id.* at **7. As the court stated, " . . . the event triggering termination of the contracts is totally beyond the control of the plaintiff, [Government]. The 'event' is essentially the will of [health insurers] FHP and GMHPA to revoke the agreements." *Id.* at **8.

In addition to the express reference in the text of the subject Agreement, the Appellate Division case was also expressly mentioned in a Guam statute governing the Agreement. 4 G.C.A. §4301(g); Pet. 3.[5] Thus, both the Agreement and Guam statutory law command adherence to the Appellate Division case. Since that ruling expressly held that insurers could unilaterally terminate the agreements, the Government's bedrock contention that the subject Agreement only contemplated termination in the event of non-payment of premium is simply, and demonstrably, incorrect.

Although the arbitration clause at issue was extremely broad and encompassed "any dispute or controversy," the Superior Court vacated the arbitral award on the ground that the dispute was outside the scope of the arbitration agreement and, therefore, the arbitrators did not have the power to deny renewal of the Agreement. The Guam Supreme Court reversed this ruling, relying on a routine application of this Court's precedents in the area of arbitrability, and making no new, novel or unique findings of law. Thus, it can be seen that this case does not meet any of the standards for *certiorari* under this Court's rules. There is no split between the circuits on any important issue of law. There is not even a dispute over the meaning of any of this Court's precedents. Rather, at most, the Government contends that the Guam Supreme Court incorrectly concluded that the dispute between the parties was within the scope of the broad arbitration clause. This

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[5] The statute provides that, "[t]he Governor of Guam shall incorporate the continuing provision clause . . . which was the subject of the District Court of Guam Appellate Division Case, *Government of Guam v. FHP, Inc.*, (D. Guam App. Div. 1991), in the government's group health insurance agreement with any health insurance company. . . ."

is the kind of finding that courts make every day; and no novel or unique issues are raised. The Government is simply disappointed with the result, but points to no issues meriting *certiorari*.

B. Mischaracterization of the Law

Just as it mischaracterized the case, the Government also mischaracterized the current state of the law concerning the interpretation of contracts containing arbitration clauses. The Government quoted *Volt Information Sciences Inc. v. Bd. of Trustees, Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989), for the uncontroversial proposition that the FAA "'simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.'" Pet. 16. However, the Government neglected the remaining issues addressed in *Volt*. For example, the *Volt* court also reiterated that questions of arbitrability in contracts subject to the FAA must "'be addressed with a healthy regard for the federal policy favoring arbitration' and that 'any doubts concerning the scope of arbitrable issues . . . be resolved in favor of arbitration.'" *Id.*, 489 U.S. at 475, *quoting Moses H. Cohn Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). As this Court explained in *Volt*, "'as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability.'" *Id.*, *quoting Mitsubishi Motors Inc. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

Similarly, in *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2002), the Court observed that ambiguities in the language of the agreement should be resolved in favor of arbitration. *Id.* at 294. Nevertheless, the *Waffle House* decision recognized that a court may not reach "a result

inconsistent with the plain text of the contract simply because the policy favoring arbitration is implicated." *Id.* This latter concern does not and cannot mean that arbitration clauses must contain a list of every foreseeable issue that could arise under the contract. As shall be demonstrated below, neither *Waffle House* nor any other case from this Court supports the Government's position that the mere failure to mention a particular type of dispute precludes arbitrability. In any event, the most that could be said in this case is that the Government disagrees with the Guam Supreme Court's finding that the instant dispute comes within the scope of the arbitration clause – a routine determination that involves the application of settled principles of law.

II.

THE GUAM SUPREME COURT'S OPINION IS CONSISTENT WITH THIS COURT'S RULINGS

The Government has materially mischaracterized the holding of the court below. According to the Government, "[t]he opinion of the Supreme Court of Guam holds that, because of the unforeseeability of events which might cause a party to want to terminate a contract, it is only right, fair and just for the arbitrators to insert terms in the original contract not contemplated by the parties." Pet. 23. Of course, the Guam Supreme Court said nothing of the kind; and the Government conspicuously failed to point to any text of the Opinion allegedly containing such a holding.

In fact, what the Guam court held was that, based upon its examination of the law, the Agreement and, in particular, its broad arbitration clause, "[t]he question of whether PacifiCare was obligated to continue coverage or

could terminate coverage, was a subject matter which could be considered by the arbitrators *specifically because* termination was permitted under the Agreement and law applicable to the Agreement." Opinion ¶43, Pet. App. 33a (emphasis in the original). The court continued, "[i]t would be incongruous to conclude that by specifying instances where termination would be allowed, the parties necessarily intended to exclude from arbitration questions of termination which were not specified in the Agreement but otherwise arose out of the contract. The parties cannot be expected to anticipate every possible issue or dispute that could arise, or every possible remedy for a dispute." *Id.*

Nowhere in its Opinion did the Guam Supreme Court countenance "inserting terms in the original contract not contemplated by the parties." To the contrary, the court, in interpreting the Agreement, properly reviewed what the parties *had* contemplated; and it did no more than what courts regularly and properly do when determining whether an issue is arbitrable.

This Court's precedents plainly permit arbitration of issues not expressly discussed in an agreement. For example, in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), this Court permitted an arbitration panel to award punitive damages although the arbitration agreement was silent regarding punitive damages. Likewise, in *John Wiley*, this Court found that a corporate employer was bound to arbitrate an issue pursuant to an agreement between the union and another company with which the employer had merged, notwithstanding the Court's observation that "[i]n all probability, the situation created by the merger was one not expressly contemplated . . . when the agreement was made in 1960." *Id.*, 376 U.S. at 554.

Finally, this principle was recently confirmed by this Court in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002), where the Court instructed lower courts to evaluate only the "gateway" issues in deciding arbitrability (*i.e.*, did the parties agree to arbitrate, is the dispute within the scope of that agreement, and is the agreement enforceable?). This is precisely what the Guam Supreme Court did in this case.

The Government cannot manufacture a novel legal issue by the artifice of mischaracterizing the Guam Supreme Court's holding. In fact, the Government has not pointed to any part of the Guam Supreme Court's Opinion which allegedly "contravenes relevant decisions of [this] Court" or "deviated from federal precedents." (Pet. 11, 12, respectively.) Thus, *certiorari* review is not warranted under Supreme Court Rule 10(c).

The Rules of this Court clearly explain that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10. The instant petition is nothing more than a claim of error by the Guam Supreme Court. Here, the trial court's vacatur was reversed by the Guam Supreme Court not because of the application of incorrect standards, but rather, because of a routine determination of arbitrability. The issue of whether the Guam Supreme Court erroneously *applied* the law in deciding the arbitrability question is not relevant to a determination of *certiorari* under this Court's rules.

III.

THE QUESTION RAISED BY THE GOVERNMENT NOW WAS NOT PRESSED OR PASSED UPON BELOW

Earlier this term, the Court observed that, ". . .this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.'" *Howell v. Mississippi*, ___ U.S. ___, 125 S. Ct. 856, 858 (2005) (*per curiam*), *quoting Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*). *Certiorari* should not be granted where the state supreme court did not expressly address the question for which *certiorari* is sought and the petitioner does not meet its burden of showing that the issue was properly presented to that court. *See Adams*, 520 U.S. at 86.

The Government concedes that it did not raise below the precise question presented in its *certiorari* petition. Pet. 15. Indeed, neither the Government's briefs nor the Guam Supreme Court's Opinion addressed the question of whether issues must be specifically listed in a contract in order to be arbitrable. The parties and the Court instead focused on a host of other issues involving the circumstances when an arbitral award may be vacated.

The Government's reliance upon *Illinois v. Gates*, 462 U.S. 213, 220 (1983), is misplaced. In *Gates*, this Court reaffirmed the rule against deciding claims "not pressed or passed upon" in state court. 462 U.S. at 219. In declining to consider an issue relating to the exclusionary rule based upon the "not pressed or passed upon" rule, the *Gates*

court observed that "although the Illinois courts applied the federal exclusionary rule, there was never 'any real contest' on the point." *Id.* at 223; *quoting Morrison v. Watson*, 154 U.S. 111, 115 (1894).

Likewise, in the instant case, there was never "any real contest" on the point the Government now presses. Here, the broad arbitration clause provided for arbitration of any dispute or controversy arising under the contract, but it did not specifically state that termination for failure to reach agreement on rates was arbitrable. The Guam courts applied the general rule that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit" (Opinion ¶24, Pet. App. 20a), but the Court was not asked to address and did not address whether the absence of a list of specific disputes that would be arbitrable is fatal to enforcement of an arbitration clause. The Government never argued such a point; and the Guam courts had no occasion to analyze it.

As the Government implicitly acknowledges (*see* Pet. 15), neither the majority nor the dissent in the Guam Supreme Court Opinion addressed whether the policy requiring strict enforcement of an agreement to arbitrate equates "silence" with inarbitrability.[6] In short, the Guam Supreme Court simply did not reach the issue now advanced by the Government. Accordingly, *certiorari* review

[6] While Guam Supreme Court Associate Justice Torres' dissenting opinion maintained that, in his view, the parties did not intend to arbitrate the issue of termination, he reached this conclusion only after undertaking a detailed analysis of the Agreement as a whole, spanning some ten paragraphs in his dissenting opinion. Opinion (Dissent), Pet. App. 47a-56a. No such extended discussion would have been necessary if Justice Torres had concluded that the mere absence of express language on the matter was a sufficient ground for holding the issue inarbitrable.

is not justified by Rule 10(c), because it cannot be said that a state court, in this instance, "decided an important question of federal law that has not been, but should be, settled by this Court, or has decided [it] . . . in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

IV.

THIS CASE IS NOT THE PROPER VEHICLE FOR REVIEW OF ISSUES RAISED IN *GREEN TREE*

The Government seizes upon the opinions issued by members of this Court in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), and then makes an ungainly attempt to fit the instant case within the parameters of *Green Tree*. The Government has failed to show that the instant case presents an appropriate vehicle for review of questions raised in *Green Tree*. First, *Green Tree* did not leave unresolved the question of whether silence makes an issue inarbitrable. That issue was simply not addressed in *Green Tree*. Second, the Guam courts did not and could not reach that question either, inasmuch as the contract at issue was not "silent" as to the issue of termination.

A. The Dissent in *Green Tree* Did Not Advocate the Rule the Government Proposes

The Government maintains that the instant case presents an appropriate vehicle for resolving an issue supposedly left unanswered in *Green Tree*; to wit, whether the FAA allows arbitrators, under a broad arbitration clause, to enforce an arbitration clause in the absence of an express list of the specific issues to be arbitrated.

However, this argument hinges on a faulty interpretation of *Green Tree*.

According to the Government, "[t]hree justices of this Court, in a dissenting opinion in *Green Tree* . . . found that the FAA requires an arbitration agreement to be strictly enforced according to its terms if the agreement is 'silent' as to the matters on controversy." Pet. 10. This characterization is incorrect. Although the *Green Tree* dissent stressed the principle of enforcing agreements to arbitrate according to their terms, 539 U.S. at 458, the thrust of the dissent was the assertion that class-action arbitration was contrary to an express provision of the agreement to arbitrate that required the petitioner and each buyer agree to a particular arbitrator for disputes between petitioner and that specific buyer. *Id.* at 459.

It was not the absence of specific language in the contract that troubled the dissent, it was a perceived conflict between the contract's *existing* language and the result reached by the South Carolina Supreme Court.[7] In fact, neither the dissent nor any of the opinions filed in *Green Tree* advanced, or even discussed, any *per se* rule, urged by the Government here, that would render issues not expressly listed in an agreement inarbitrable.

In the case *sub judice,* the Government does not maintain that the Guam Supreme Court's ruling contravened any *express* provision of the contract. In fact, the

[7] The dissent observed that the imposition of class-wide arbitration "contravenes the just-quoted provision about the selection of an arbitrator." *Id.* As the dissent put it, "[h]ere, the Supreme Court of South Carolina imposed a regime that was contrary to the express agreement of the parties as to how the arbitrator should be chosen." *Id.*

Government essentially concedes this point in the final paragraph of its petition by the manner it which it characterized the Guam Supreme Court's Opinion. *See* Pet. 24 ("This Opinion holds that various terms may be added to the parties' agreement to arbitrate so long as those procedures do not *directly conflict* with the arbitration agreement.") (emphasis in the original).

Instead, the Government merely urges adoption of a novel rule, apparently never embraced by any reported court decision, that would deny arbitration as to any issue not expressly set forth in an agreement to arbitrate. The Government has failed to show that any such rule is either necessary or desirable. Neither has the Government attempted to harmonize such a rigid *per se* rule with the well-settled judicial "presumption of arbitrability" embodied in the FAA. *See Warrior & Gulf*, 363 U.S. at 582-583.

This Court has never retreated from the rule that doubts about arbitrability should be resolved in favor of coverage. *See Mitsubishi*, 473 U.S. at 626. Neither has the Court backed away from the conclusion that where an agreement contains a broad arbitration clause, "[i]n the absence of any express provision excluding a particular grievance from arbitration, we think that only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Warrior & Gulf*, 363 U.S. at 583; *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 380 (1974). The Government has given the Court no reason to revisit such well-settled principles now.

B. This Case is Fundamentally Distinguishable from *Green Tree*

The Government has failed to show any justification for granting *certiorari* in the case *sub judice* based upon *Green Tree*. First, this case does not involve class action arbitrations at all. Thus, this case cannot possibly shed light on that subject. Second, the Government has not cited any "unsettled" legal point at issue in this case on which this Court has not already spoken.[8] Third, because the law is in fact so well settled on this point, the Government has failed to show any "recurring issue" concerning the matter which would warrant this Court's review.[9]

Moreover, even if the Government had advanced sound reasons for coining a new rule governing arbitrability, it has failed to demonstrate that this is the proper case for advancement of such a rule. This case is fundamentally distinguishable from *Green Tree*. In *Green Tree*, the subject agreement was completely *silent* on the key subject of class action arbitration. In contrast, as the Guam Supreme Court observed, the Agreement at issue in this case made express mention of "termination" in several respects. Pet. App. 32a. In addition, the termination issue was thoroughly addressed by the Appellate Division case, which

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[8] In contrast, the fact that *certiorari* was granted in *Green Tree* is understandable. As the South Carolina Supreme Court observed, this Court had not yet addressed the FAA's impact on class-wide arbitration, and courts that had addressed the issue had taken two different approaches. *See Bazzle v. Green Tree Fin. Corp.*, 351 S.C. 244, 257, 569 S.E. 2d 349 (S.C. 2002).

[9] As indicated, this Court has regularly reiterated that " . . . due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." *Volt*, 489 U.S. at 476.

was embodied both in the Agreement as well as in the Guam statute that governed the Agreement.

While there is room for argument as to what events might justify termination under the Agreement, there is no room for debate over the fact that "termination" was discussed in the Agreement and the applicable law. Given this key factual distinction, the Government has simply failed to set forth any principled basis for *certiorari* review of this case on the strength of *Green Tree*. There is simply no "unsettled" question of federal law which consideration of this case would resolve.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Government's petition should be denied.

Dated this 10th day of March, 2005.

Respectfully submitted,

RANDALL TODD THOMPSON
MAIR, MAIR, SPADE & THOMPSON
A Professional Corporation

Counsel of Record for Respondent

IN THE TERRITORY OF GUAM
ARBITRATION PROCEEDING

PACIFICARE HEALTH INSURANCE COMPANY OF MICRONESIA, INC.	)	
Claimant,	)	**ARBITRATION AWARD ON REMAND FROM THE SUPERIOR COURT**
vs.	)	
GOVERNMENT OF GUAM,	)	
Respondent.	)	

On October 20, 2003, the Superior Court of Guam remanded this matter to the Arbitration Panel with instructions " . . . to arbitrate appropriate medical benefits and rates between Pacificare and GovGuam for Fiscal Year 2004". The Court also requested this panel to conclude arbitration and announce the decision by October 28, 2003.

A logistical problem presented itself as only one arbitrator is in the Mariana Islands. However, extensive telephonic and facsimile transmissions have been utilized so that the panel can consider and comply with the remand of the Superior Court within the time frame set forth by the Court.

The panel is also in receipt of Pacificare's "Supplemental memorandum on Remand to Arbitrators".[1]

[1] Pacificare essentially makes two points. First, it reserves its right to contest the propriety of the Court's decision and order of October 20,

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The Government of Guam has filed with the panel a "Request For Scheduling Order". In that document, the Government states that a " . . . further hearing is both appropriate and necessary to complete arbitration regarding rates and benefits."

The Government also sets forth several requests on how to proceed with a Further Hearing.[2] In essence, the requests amount to a restart of the whole proceedings, including discovery, response to discovery requests, scheduling of a new hearing, along with pre-hearing memoranda and exchange of witness lists.

The Superior Court, the parties and this panel are all desirous of one result – a health plan for GovGuam employees and retirees which, in the words of the Superior Court, " . . . Pacificare can feasibly offer to GovGuam to remain a viable business enterprise in the wake of its contractual relationship with the government of Guam." Clearly, it does no one any good to force Pacificare into bankruptcy.

2003: second, it asserts that no further hearing is required as the panel already has evidence on rates and benefits for Fiscal Year 2004.

[2] Anticipating the logistical problems noted above, GovGuam requests, in essence, that this panel abdicate in favor of substitute arbitrators selected by this panel or have this panel "appoint a master to review the proposed rates and benefits so that he or she (the master) can assist the arbitrators in determining fair rates and benefits". This panel declines to opt for either of these paths for several reasons. A great amount of time and expense has already been spent on this matter. The parties, as well as the Superior Court, are cognizant of the narrow time frame in which this matter needs to be resolved. Further, it is very doubtful if this panel has the authority or power to appoint substitutes or a master. It is clear the Superior Court intended this panel to complete this matter and this panel will not avoid that responsibility.

A misconception of sorts by the Superior Court is gleaned by this panel as to the scope of the hearing held in September. On Page 27 of its opinion, the Court stated: "The parties' dispute regarding medical benefits and rates was never presented to the arbitrators for resolution.["]

Indeed, a great deal of the testimony and the exhibits offered went to this very issue. The panel, in its original award, did not proceed to consider this evidence as it found that to do so was not necessary for the reasons stated in its decision of October 1, 2003.

In light of the remand of the Superior Court, the panel accepts the responsibility imposed upon it by the parties pursuant to their arbitration agreement and as requested by the Superior Court.[3]

The testimony and exhibits presented to the panel on September 30th demonstrated beyond doubt (and without any contradiction by GovGuam) that to require Pacificare to continue to provide health care benefits and rates anywhere near those charged in Fiscal Year 2003, would impose substantial financial losses on Pacificare. Although GovGuam disputed, to some extent, that Pacificare was in a "death spiral", this panel finds that at the Fiscal Year 2003 rates, this was and is the case.[4]

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[3] Pursuant to the arbitration agreement and according to standard arbitration procedures, arbitration awards are usually terse and absent an opinion-like format. Since this matter has taken on a somewhat different structure, this panel has opted to be more verbose in stating this award on remand.

[4] Essentially, a "death spiral" results when the composition of the patients (users) of the health plan and the benefits provided cause the health provider to raise rates to meet expenses. This causes the users of the plan who are healthier or are not in need of the higher priced health

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The Superior Court was clear in expressing its concern about having rates and benefits so that Pacificare could continue to provide GovGuam employees and retirees and still make a profit.

However, at the crux of this matter is a crucial problem. The GovGuam health plan benefits and the composition of the users presents perhaps an insolvable situation. Pursuant to Exhibit 79, it is known that the number of GovGuam retirees in the plan has continued to increase. As expected, this class of users need and demand more care and hence more funding for their care. The Government of Guam at the hearing of this matter acknowledged the inherent problem with the existing plan.

Nonetheless, this panel will strive to comply with the remand of the Superior Court although there is no assurance the rates and benefits award[ed] herein will: (1) Provide Pacificare with reasonable profit of 5% – a goal which at least presently has not been attained; (2) Provide GovGuam employees and retirees with a health plan at rates and benefits which they are willing (and able) to pay.

Pacificare presented evidence and exhibits setting forth its proposals for the health plan for Fiscal Year 2004. The Government of Guam declined to accept any of the proposals and it is not clear to this panel exactly what is acceptable to it – other than rates and benefits close to those provided in Fiscal Year 2003. To comply with the mandate of the Superior Court and to be as specific as

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plan to withdraw from the plan. This leaves the users who need more health care in the plan which drives up the costs even more. The cycle is repeated until the health provider raises the premiums so high everyone opts out and the health care provider is financially ruined.

possibly and to bring this matter to a conclusion the panel must and shall rely on the evidence and exhibits presented at the September 30th hearing. Accordingly the award of this panel is as follows:

AWARD ON REMAND

The Fiscal Year 2004 rates for the GovGuam – Pacificare health plan shall be:

1. $750 deductible
2. Medical: Class I at $913.70 per month.
   Class II and III at $2,732.34 per month.
3. Dental: Class I at $39.42 per month
   Class II and III at $105.77 per month

The benefits are those set forth in Pacificare's Exhibit 42 (attached hereto).

Dated: 10/27/03 /s/ Robert A. Hefner
ROBERT A. HEFNER
Arbitrator

Dated: 10/30/03 /s/ William M. Fitzgerald
WILLIAM M. FITZGERALD
Arbitrator

Dated: 10/30/03 /s/ G.W.F. Gumataotao
G.W.F. GUMATAOTAO
Arbitrator